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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935

No. 696

CHICAGO GREAT WESTERN RAILROAD COMPANY, PETITIONER,

vs.

MARY RAMBO, AS ADMINISTRATRIX OF THE ESTATE OF ROY C. RAMBO, DECEASED

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

PETITION FOR CERTIORARI FILED JANUARY 13, 1936.

CERTIORARI GRANTED FEBRUARY 17, 1936.

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[fol. 1]

IN DISTRICT COURT OF DAKOTA COUNTY, FIRST JUDICIAL DISTRICT

MARY RAMBO, as Administratrix of the Estate of Roy C. Rambo, Deceased, Plaintiff, Respondent,

vs.

CHICAGO GREAT WESTERN RAILROAD COMPANY, a Corporation, Defendant, Appellant

COMPLAINT

Plaintiff for her complaint aganst the defendant in the above entitled action, complains and alleges:

I

That defendant now is, and at all times hereinafter mentioned has been, a corporation duly organized and existing under and by virtue of the laws of the State of Illinois, [fol. 2] and as such owns and operates as a common carrier for hire a line of railway extending in the State of Minnesota and in and through the villages of Randolph and Hampton, both in Dakota County, Minnesota.

II

That defendant is, and at all times herein mentioned has been, an interstate railway and interstate carrier for hire; that at the time of the death of the above named decedent on December 8th, 1933, as hereinafter set forth, said defendant was engaged in interstate commerce.

III

That on the 8th day of December, 1933, one Roy C. Rambo died intestate and left surviving him his widow, Mary Rambo, and five minor children whose names and ages are as follows:

Idella L. Rambo, aged 17 years.
Willis L. Rambo, aged 15 years.
Lavada F. Rambo, aged 13 years.
Joyce M. Rambo, aged 8 years.
Craig R. Rambo, aged 3 years.

and that Mary Rambo and the aforementioned children were dependent upon the said Roy C. Rambo for their

support and maintenance; that this action is brought by plaintiff as the personal representative of said Roy C. Rambo for the benefit of said surviving widow and children.

[fol. 3]

IV

That on the 19th day of March, 1934, this plaintiff was, by the Probate Court of Dakota County, Minnesota, a court having jurisdiction, duly appointed as the administratrix of the Estate of said decedent and thereafter duly qualified as such administratrix.

V

That at all times herein mentioned, the above named decedent, Roy C. Rambo was employed by the defendant, its agents, servants, and employees, as a signal maintenance and repair man, and that it was the duty of the decedent as a part of such employment to maintain defendant's signals upon its interstate railroad between Empire Station and Randolph Station, both in Minnesota; that said decedent immediately prior to his death resided at the Village of Randolph, Dakota County, Minnesota; and that it was the duty of said decedent to control, manage, and operate a certain gasoline motor car over the tracks and line of defendant's railway between the Villages of Hampton and Randolph and at other points on defendant's railway.

VI

That on the 8th day of December, 1933, between 4:30 o'clock and 5:30 o'clock in the afternoon of said day, said decedent, in the course of his duties, was rightfully and lawfully operating said motor car within the scope of his [fol. 4] employment and in the course of his duties and that in so acting he was traveling in a southerly direction enroute through the Village of Hampton on the railroad track of said defendant; that decedent stopped at defendant's station in said village and then proceeded in a southerly direction enroute to the Village of Randolph on said track; that decedent was then and there employed in interstate commerce.

VII

That at said time and place a certain railway passenger train, operated by defendant, was proceeding in a South-

erly direction upon said track, proceeding from St. Paul toward the Village of Randolph; that by reason of the negligence of the defendant, its agents, servants and employees, said passenger train was delayed approximately one hour through a fatal accident which occurred near Rich Valley Station upon said railroad and that said train was almost invariably on time as it proceeded through Hampton and Randolph Village; that on this date, said train was about one hour behind schedule as it proceeded through said Hampton Village.

VIII

That the defendant maintains and operates at the Village of Hampton a station under the direction of a station agent employed by the defendant and said station is equipped with telegraphic devices for communication with [fol. 5] other points on the railroad and with the dispatcher of the trains operated upon said railroad, and is equipped with a device for giving messages to the trains upon said track while said trains are in motion.

IX

That at said time, decedent stopped at said station at the Village of Hampton and then proceeded southward upon said railroad track toward the Village of Randolph; that the station agent of the defendant saw decedent upon the track, and recognized him, greeted him, and recognized his danger in proceeding upon said track directly in the path of the through passenger train which was far behind schedule, and said station agent negligently and carelessly failed and neglected to warn decedent of the approach of said passenger train and by his conduct led decedent to believe that said track was clear for decedent's journey to Randolph; that by reason of said negligence of said station agent, decedent proceeded in a Southerly direction upon said track in the path of said passenger train.

X

That said station agent knew that decendent was upon said track and knew that said passenger train would overtake him; that he knew that the daylight would soon change to darkness and that said station agent had the

opportunity and equipment to warn the said passenger train of the presence of decedent upon the track; that said [fol. 6] station agent failed and neglected to warn said passenger train and failed and neglected to report the presence of said decedent upon said track to the dispatcher or any of his superiors in the employ of the defendant.

XI

That while said decedent was so traveling southerly upon said railroad track at a point between the Hampton Station and the Randolph Station on said railroad, the defendant, its agents, servants and employees, negligently, recklessly, carelessly and wantonly and without giving notice to the decedent of the approach thereof, ran and propelled said railway passenger train upon and over said motor car upon which said decedent was riding; that the locomotive on said passenger train was negligently and unlawfully operated at said time and place without being equipped with a proper headlight and without being equipped with a proper pilot in front of said locomotive; that said locomotive was equipped with an insufficient, dangerous and defective headlight; that said headlight did not afford sufficient illumination to enable the agents and employees of said defendant to see ahead upon said track a sufficient and proper distance as required by law; that the defendant, its agents, servants, and employees were negligent in that after seeing said decedent and said motor car upon said track, said defendant, its agents, servants and employees failed and neglected to utilize the means under their control to avoid said collision; that at [fol. 7] said time and place said passenger train was being operated with the knowledge of the defendant, its agents and employees by employees who were not in a condition to properly operate said passenger train; that said defendant, its agents, servants, and employees were otherwise then and there negligent in the operation of said railway train.

XII

That as a direct and proximate consequence of the negligence of the defendant, its agents, servants and employees as aforesaid, said locomotive collided upon and against said motor car upon which decedent was riding

and that as a direct result of said negligence, decedent was killed.

XIII

That during the lifetime of said decedent, he contributed to and was the sole means of support and maintenance of his wife and minor children; that prior to his death said decedent took a great interest in his said family and gave them care, attention, instruction, training, advice and guidance concerning their moral, intellectual, physical, and general welfare and training, and that said decedent was a fit and competent person to give such instruction, care and advice.

XIV

That at the time of his death decedent was 40 years of age, strong, vigorous, and in good health, and was earn- [fol. 8] ing at the time of his death approximately $150.00 per month.

XV

That by reason of the death of said Roy C. Rambo as aforesaid, damages have resulted to said widow and surviving children in the sum of $50,000.00 for the loss of support, maintenance, services, care, attention, instruction, advice, and guidance of decedent to said widow and children, and in the loss of the money decedent would have contributed to said widow and children had he not come to his untimely death as aforesaid.

XVI

That as a direct and proximate result of decedent's death, and of the negligence of defendant as aforesaid, funeral expenses in the sum of $400.00 were necessarily incurred by the estate of said decedent.

Wherefore, plaintiff demands judgment against the defendant in the sum of $50,400.00, together with her costs and disbursements in this action.

H. E. Stassen, Elmer J. Ryan, Attorneys for Plaintiff, Farmers Union Building, South Saint Paul, Minnesota.

[fol. 9] IN DISTRICT COURT OF DAKOTA COUNTY

ANSWER

Now comes the defendant, and for its answer to plaintiff's complaint herein:

I

Admits Paragraphs I and II of plaintiff's complaint;

II

Admits that on or about the 8th day of December, 1933, Roy C. Rambo suffered an injury from a collision with one of defendant's trains, which resulted in his death;

III

Alleges that the injuries sustained by said Roy C. Rambo, which resulted in his death, were caused by his own negligence and carelessness, and not on account of any negligence or carelessness of the defendant;

IV

Alleges that Roy C. Rambo, at the time of the happening of said injury which caused his death, and prior thereto, knew, understood, appreciated and assumed each and every danger, hazard or risk of being injured at the time, place and in the manner as described in the complaint, which in any manner whatsoever caused, induced or contributed to his accident, injuries and death;

[fol. 10] Except as hereinbefore admitted or alleged, the defendant denies each and every allegation, matter and thing in plaintiff's complaint contained, and each and every part and portion thereof whether as therein alleged or otherwise or at all.

Wherefore, Defendant demands judgment that plaintiff take nothing by this action, and that it have and recover its costs and disbursements herein.

Stearns, Stone & Mackey, Attorneys for Defendant, 928-38 Minnesota Building, Saint Paul, Minnesota.

IN DISTRICT COURT OF DAKOTA COUNTY

REPLY.

Now comes the plaintiff and for her Reply to the Answer of the defendant herein:

I

Denies generally each and every allegation, matter and thing in said answer contained, except insofar as the same admits the allegations of the complaint herein.

Wherefore, plaintiff prays judgment as demanded in her complaint herein, together with her costs and disbursements.

H. E. Stassen, Elmer J. Ryan, Attorneys for Plaintiff, Farmers Union Building, South St. Paul, Minn.

[fol. 11] IN DISTRICT COURT OF DAKOTA COUNTY

Settled Case

The above entitled action came on for trial before this Court, Honorable W. A. Schultz, Judge, and a jury, on the 23rd day of May, 1934; Messrs. H. E. Stassen and Elmer J. Ryan appearing as attorneys for plaintiff, and Messrs. Stearns, Stone & Mackey appearing as attorneys for defendant.

A jury was duly empaneled and sworn.

Opening statement on behalf of the plaintiff made to the jury by Mr. Stassen.

MARY RAMBO, being called as a witness on behalf of the plaintiff, was first duly sworn, and testified on direct examination as follows:

Examined by Mr. Stassen:

Q. What is your name?
A. Mrs. Mary Rambo.
Q. R-a-m-b-o?
A. Yes.
Q. And you are the widow of the late R. C. Rambo?
A. Yes.

Q. You reside at Randolph, Dakota County, Minnesota?
A. Yes.
Q. And you have resided there a long time?
A. Six years.
Q. And you are administratrix of the estate of R. C. Rambo?
[fol. 12] A. Yes.

Plaintiff's Exhibit A marked for the purpose of identification.

Mr. Stassen: Offer in evidence Plaintiff's Exhibit A, Certified Copy of Letters of Administration.
The Court: Received.

Q. Mrs. Rambo, you were married to Mr. Rambo on June 9, 1915?
A. Yes.
Q. And at that time what was Rambo's occupation?
A. He was employed as a helper for The Chicago Great Western at the depot in McIntyre, Iowa, he was a freight helper, he handled freight at the depot.
Q. He was employed as a helper for The Chicago Great Western at the depot in McIntyre, Iowa?
A. Yes.
Q. What was his next position following that position?
A. He was timekeeper for the extra gang on the Great Western out of McIntyre towards Spring Valley.
Q. How long did he follow that position?
A. I imagine not more than four months.
Q. Following that what was his occupation?
A. He went to New Hampton as helper for the Signal Maintainer there.
Q. Was that New Hampton, Iowa?
A. Yes.
Q. Do you remember when it was he went to that occupation?
[fol. 13] A. That was in November, 1917.
Q. And following that what was his next position?
A. In January he was made maintainer for signals there at New Hampton, Iowa.
Q. He became a signal maintainer in January, 1918?
A. In 1918.
Q. For the Chicago Great Western?
A. Yes.

Q. What was his location at that time?

A. He worked from New Hampton to Alta Vista, north, and from New Hampton to Sumner, south.

Q. In Iowa?

A. Yes.

Q. On the Chicago Great Western Railroad?

A. Yes.

Q. And how long did he work in that location?

A. We stayed there from 1918 to 1924.

Q. Then where did you go?

A. Gladbrook, Iowa.

Q. At the same sort of work?

A. He was a signal maintainer, lineman they called it there, there were no signals to maintain.

Q. And from Gladbrook where did you go?

A. We moved back to New Hampton for about three months, and then we came to Randolph.

Q. When did you come to Randolph?

A. Well, Mr. Rambo came up in April, 1928, I think it was.

Q. In the capacity of signal maintainer?

[fol. 14] A. Yes.

Q. He followed that occupation for the Chicago Great Western from January, 1918, to the date of his death?

A. Yes.

Q. And was he so employed on the eighth day of December, 1933?

A. He was.

Q. When did you come to Randolph with the family?

A. We came to Randolph in June of 1928, we left New Hampton after school closed.

Q. You left New Hampton after school closed?

A. Yes.

Q. And then you moved to Randolph with the family?

A. Yes.

Q. He received his transfer order?

A. Yes.

Q. And you remained in New Hampton until school closed?

A. Yes.

Q. How many children did Mr. Rambo leave him surviving?

A. Five.

Q. Idella is the oldest?

A. Yes.
Q. How old is she?
A. She was seventeen the day before her father was killed.
Q. She was seventeen the day before her father was killed?
[fol. 15] A. Yes.
Q. That would be the seventh day of December, 1933?
A. Yes.
Q. She was born on December 7, 1916, then?
A. Yes.
Q. What is the name of the second child?
A. Willis.
Q. How old is he?
A. Fifteen.
Q. When is his birthday?
A. July 11.
Q. 1918?
A. Yes.
Q. And Lavada F. Rambo is the third child?
A. Yes.
Q. She is thirteen years of age?
A. Yes, her birthday is July 5, she was born in 1920.
Q. Joyce M. is the fourth child?
A. Yes.
Q. When was she born?
A. November 5, 1925.
Q. She is eight years old?
A. Yes, she is eight.
Q. And Craig is the baby?
A. Yes.
Q. He is three years old?
A. He is four years old now, he was three years old at the time his father died.
Q. His birthday being January 7, 1930?
A. Yes.
[fol. 16] Q. You maintained your own home there at Randolph since you came up with the children?
A. Yes.
Q. Where do you live in Randolph?
A. About one mile south of town, on a little farm.
Q. How many acres?
A. We have close to eighteen acres.

Q. And you are purchasing that place under a contract for deed?

A. Yes.

Q. Now prior to Mr. Rambo's death did you or the children have any outside means of support?

A. No, sir.

Q. Was your entire income from the wages that Mr. Rambo was making and from the little farm?

A. Yes.

Q. What did you do in developing that farm?

A. We set out raspberry plants, and cleaned the place up, that is about all we done.

Q. How many raspberry plants did you set out?

A. Close to three thousand I should think.

Q. Did Mr. Rambo take any part in that work?

A. He helped, we all helped him.

Q. What were his ordinary hours on the railroad, what time did he start in the morning?

A. He reported at eight o'clock in the morning, and was off duty at five in the evening.

Q. And prior to reporting what was his custom in the summer?

[fol. 17] A. Usually in the summer he got up around four o'clock and worked until seven thirty, and then he would go to work for the railroad, but before he went to work from four until seven thirty he worked around the farm in the berries and in the garden.

Q. Was that an unusual or usual practice?

A. That was his usual practice in the summer time.

Q. In the summer time?

A. Yes, morning and evening both he worked out around the place.

Q. Apart from berry picking season, did you hire any outside help for the farm?

A. No, we never hired any for berry picking so far.

Q. Mr. Rambo and yourself and children maintained the place?

A. Yes.

Q. Do you know what the rate of pay of Mr. Rambo was at the time of his death?

A. Seventy-eight cents an hour less ten per cent of that.

Q. The rate was figured at seventy-eight cents an hour?

A. Yes.

Q. How many hours did he ordinarily put in in a week?

A. He put in his eight hours a day, and that was for the six days a week, only once in a while they were laid off and got in five days a week.

Q. You state that from this rate of seventy-eight cents an [fol. 18] hour after it was calculated there was a ten per cent reduction?

A. Yes, of everything, if they worked overtime there was ten per cent of that.

Q. In other words the check was calculated and then there was a ten per cent reduction?

A. Yes.

Q. When did that go into effect?

Q. I could not tell just when, but it was when the railroads took a cut all over the United States.

Q. In the last couple of years?

A. Two years anyway.

Q. And prior to that what was the rate of pay?

A. Seventy-eight cents an hour without the cut.

Q. Without the cut of ten per cent?

A. Yes.

Q. Can you tell us approximately what his weekly checks averaged?

A. Around seventy-two dollars, sixty-eight to seventy-four dollars, that was for a two weeks period.

Q. Sixty-eight to seventy-two for a two weeks period?

A. Yes, around that.

Q. Was there also a provision in the last year as to a certain layoff?

Mr. Stearns: I presume this is all incompetent, objected to as being incompetent and hearsay. We are willing to furnish the figures of the actual money paid R. C. Rambo for the year prior according to the payroll.

[fol. 19] Mr. Stassen: We are willing to have read into the record the actual pay received.

Mr. Stearns: For the month of December, 1932, $147.52; January, 1933, $117.94; February, 1933, $95.65; March, 1933, $123.73; April, 1933, $138.02; May, 1933, $150.22; June, 1933, $157.07; July, 1933, $154.68; August, 1933, $160.06; September, 1933, $146.19; October, 1933, $148.57; November, 1933, $142.91; and from December, 1932, up to and including November, 1933, R. C. Rambo was paid for his wages $1,679.50.

Mr. Stassen: That would be an average of approximately $140 a month.

Q. During the month of February, 1933, the check was only $95.65? Do you know of any special circumstance that month?

A. No, only that the men were laid off, I think, eight days during the month of February.

Q. How did Rambo handle the money which he received in his pay check?

A. Well, I usually handled it for him. We paid our bills with it, and put what we could away.

Q. I did not hear that.

A. We put as much as we could away every month. We saved to make the payment on the place, we paid it by the year.

Q. Was it his custom to put the check in your custody?

A. Usually.

Q. And ordinarily for the two weeks period what portion of the money did Rambo use for his personal expenditures outside of the home?

[fol. 20] A. I never kept track, but I would say about $25.00 a month for himself.

Q. About $25 a month he would use outside the home?

A. Yes.

Q. And the rest of the money how was that used?

A. Well, we used it for paying the grocery bill, coal bill, lights, improvements on the place, paying the taxes, and for making payments on the place.

Q. And sending the children to school, I suppose?

A. Clothing them and sending them to school, four of them.

Q. Did Mr. Rambo before his death take any interest in the education of the children?

A. Well, this was Idella's last year in school and we talked about sending her on another year so that she would be better able to get a position.

Q. She was graduating from High school this year?

A. Yes.

Q. You planned on sending her further?

A. Yes.

Q. Did Mr. Rambo take an active part in those plans?

A. He and I planned together, yes.

Q. Did he take an interest in the discipline of the children?

A. He did.

Q. Can you tell the relation to the children and yourself prior to his death?

[fol. 21] Mr. Stearns: Oh, I admit he was a dutiful father, took an interest in the education of his children, their home life, and all that sort of thing, there is no question about that.

Mr Stassen: If there is no question about that, we will not need to go into it further.

Q. Do you remember the morning of December 8, 1933, Mrs. Rambo?

A. Yes

Q. Did you see your husband that morning when he left for work?

A. Yes.

Q. Based upon your observations that morning, I ask you whether or not he appeared to be in good health?

A. As far as I knew he was, he got up that morning and acted as usual, he ate a good breakfast and was joking around there, he went to work and he said before going that he was going up to see the maintainer north of him, he had not been up there for a couple of weeks and he was going to see him. He seemed to be perfectly all right when he left home.

Q. About what time was that?

A. I imagine about twenty minutes of eight.

Q. Twenty-minutes of eight?

A. Yes.

Q. Did you see your husband again after that?

A. No.

Q. Was his watch brought to you after the accident?

A. Yes, it is here in my purse.

[fol. 22] Mr. Stearns: Is that for the purpose of proving time?

Mr. Stassen: Yes.

Mr. Stearns: What time do you have? Five ten is the correct time.

Mr. Stassen: Yes, a few seconds before five ten.

Mr. Stearns: We admit that the accident happened at five ten P. M. on December 8, 1933, and that R. C. Rambo was killed by reason of a locomotive striking him while on the track. I suppose you want me to make an admission of interstate commerce.

Mr. Stassen: Yes.

Mr. Stearns: It is stipulated between the parties that at the time of the death of R. C. Rambo he was engaged in interstate commerce—that R. C. Rambo and the Chicago Great Western Railroad Company were engaged in interstate commerce and interstate transportation and that that is governed by the Federal Employers' Liability Act.

Q. What was the amount of funeral expense necessarily incurred?

A. Two Hundred and Twenty Dollars.

Q. And does that include the monument?

A. No.

Q. What was the expense of the monument?

A. That would make it Three Hundred and Seventy all told, everything, that would be everything.

Q. On the farm did you also raise vegetables for your own use?

[fol. 23] A. Yes, for our own use.

Q. What vegetables did you raise?

A. We raised ordinary garden vegetables, peas, beans, carrots, potatoes and sweet corn.

Q. Did Mr. Rambo take an active part in that, too, before and after work?

A. Yes.

Mr. Stassen: You may inquire.

Mr. Stearns: I have no questions, Mrs. Rambo.

(Witness excused.)

Axel Eckstrom, being called as a witness on behalf of the plaintiff, was first duly sworn, and testified on direct examination as follows:

Examined by Mr. Stassen:

Q. What is your name?

A. Axel Eckstrom.

Q. How old are you?

A. Thirty-nine.

Q. Where do you live?

A. Empire, Minnesota.

Q. That is in Dakota County?

A. Yes.

Q. You are employed by the Chicago Great Western as signal maintainer?

A. Yes.

Q. You have been so employed for how long?

A. I have been at Empire since 1919.

Q. As a signal maintainer all that time?

A. Yes.

Q. Were you a signal maintainer before that?

[fol. 24] A. Yes.

Q. How many years ago did you start in the signal department for the Chicago Great Western?

A. I started working in the signal department in 1913 for the Great Northern.

Q. Have you been working for the Great Western during that entire period?

A. No; I started for the Great Northern in 1913, I started for the Great Western in 1916 in signal work.

Q. What is your beat on the rail- signal maintainer?

A. Approximately one-half mile east of Empire to Inver Grove.

Q. Did you know R. C. Rambo?

A. Yes.

Q. How long did you know him?

A. I knew him since he came to Randolph.

Q. That was about six years ago?

A. Yes.

Q. And was he a signal maintainer on the beat next to you?

A. Yes.

Q. During that six year period?

A. Yes.

Q. Did you see Mr. Rambo on the eighth of December, 1933?

A. I did.

Q. Where did you see him?

A. I saw him at Empire.

Q. How did he arrive at Empire?

A. On his motor car.

[fol. 25] Q. Do you use that same type of motor car in your work as a maintainer?

A. I do.

Q. And what did Rambo do at Empire?

A. He came up there to get a catalog reference for parts of his motor car.

Q. Did he see a catalog there at Empire?

A. Yes.

Q. You say he looked it over with reference to parts of his motor car?

A. Yes.

Q. Do you know what parts he was looking for?

A. No; not for certain I do not.

Q. What time did he leave Empire?

A. About two thirty.

Q. Two thirty in the afternoon of December 8?

A. Yes.

Q. Before he left had you secured a line up of the depot?

A. Yes.

Q. I ask you whether or not he saw your line up?

A. Yes; he read it over.

Q. What is the line up?

Mr. Stearns: Is it written?

A. Yes, it was written.

Plaintiff's Exhibit B marked for the purpose of identification.

Q. Showing you Plaintiff's Exhibit B, is that the line up you refer to?

A. Yes.

[fol. 26] Q. You are sure that is the same line up for that day?

A. Yes.

Q. And you say that line up was read by Rambo?

A. Yes.

Q. In your presence?

A. Yes.

Mr. Stassen: Offer in evidence Plaintiff's Exhibit B.

Mr. Stearns: Received without objection.

The Court: Received.

Q. Now, what time did you receive that line up?

A. About one P. M.

Q. And you say Rambo left there about two thirty?

A. Yes.

Q. What took place in the meantime?

A. Well, I had some lights to fill, and he got a catalog reference in my shop at that time, and when I returned back there I had the twelve fifty line up with me and I returned there about two twenty or a little later, anyway Train 61 was just going by Empire when I went down.

Q. Train 61?

A. Yes, 61 at Stanton.

Q. Is that referred to on the line up?

A. Yes.

Q. 61 at Stanton?

A. Yes.

Q. That went through going north?

[fol. 27] A. Yes.

Q. And after that did Rambo leave?

A. Yes; he left right after, that is what he was waiting for, that train to go by before he left.

Q. He waited for this train to go through Empire?

A. Yes.

Q. And he started out south?

A. Yes.

Q. At that time he was with you there at Empire and the time he left did he appear to be in good health or otherwise?

A. He did.

Q. What is the fact?

A. He was normal, the same as always.

Q. Now can you describe the speeder he was using when he left?

A. It is an Adams motor car.

Q. How many wheels has it?

A. It has four wheels.

Q. And about how heavy is it?

A. Oh, around two hundred, two hundred and fifty, maybe, all told.

Q. How is it propelled?

A. By a motor, three horse motor.

Q. What type motor?

A. An air cooled motor.

Q. Gasoline?

A. Yes.

Q. Where does the operator ride?

A. Right up at the drive wheel, where the engine is located, on the right hand side in the rear of the car.

[fol. 28] Q. On the right hand side in the rear of the car?
A. Yes.
Q. What type of seat has he?
A. We have a spring cushion.
Q. A spring cushion?
A. Yes.
Q. About how high above the ground is this seat?
A. I would say about to my hips, approximtely, when on the track.
Q. The seat you say is about the height of your hip?
A. Approximately.
Q. That is what you sit on when you are riding?
A. Yes.
Q. And is the operator riding a car, such as the Rambo car that day, fastened on in any way?
A. What.
Q. Is the man who rides the car fastened on in any way?
Q. No, he sits right on the seat, there is a guard rail to hang on to.
Q. Where is that guard rail located?
A. Front and back.
Q. Is there anything to the right of the operator, as he sits on the seat?
A. No.
Q. That is entirely clear?
A. Yes.
Q. And the man steps right off to the right of the speeder?
[fol. 29] A. He has to put his foot on the seat to step off.
Q. You have to put your feet on the seat to step off?
A. That is to step off to the right?
Q. You have ridden a car of this kind for many years?
A. All the time I have been a signal maintainer, yes.
Q. Is it possible to jump off the car while in motion?
A. Yes.
Q. There are no obstructions to prevent you doing that?
A. No.
Q. You just swing your legs up and jump to the right hand side of the track you are traveling on?
A. Yes.
Q. Where did you go at two thirty?
A. At two thirty I went about a half mile to the end of my district south, with a light and signal lamp, and then I returned and went north.

Q. And you went on north of Empire?

A. Yes.

Q. Did you stop at the station when you went back north?

A. I did.

Q. How long were you at the station?

A. Just a few minutes, I just went in to tell the agent I was going north over my district.

Q. Just to tell him where you were going?

A. Yes.

[fol. 30] Q. Did you secure any further line up?

A. No, not at that time.

Q. This line up is timed twelve fifty, is that the usual time for getting line ups?

A. Yes.

Q. What happens at that time every day?

A. The dispatcher gives this line up on the way down; he gives us a line up at seven fifty in the morning and twelve fifty at noon, those are regular line ups.

Q. Those are regular line ups that come from the dispatcher?

A. Yes.

Q. Do any other regular line ups come during the day?

A. Not regular line ups, but you can receive anything on line ups between time by asking the dispatcher over the phone.

Q. By asking the dispatcher over the phone?

A. Yes.

Q. Is the signal maintainer equipped with a phone?

A. He is.

Q. Where do you use that?

A. By hooking it on the line, and there are phones all the way along the line at the stations.

Q. Now when you went north of Empire that day, how far north did you go?

A. I went within one mile of Inver Grove.

Q. What work did you do up there?

A. I was testing the signals as I went along, relays, and I was testing the switches.

[fol. 31] Q. Were you alone at that time?

A. Yes.

Q. How long were you up there at that end of the track?

A. Well, I returned after I got back towards Rich Valley about four o'clock, a little after four.

Q. Four or a little after four?

A. Yes.

Q. Then I suppose you arrived at the scene of the first accident?

A. I did.

Q. I believe that you testified after this twelve fifty line up you did not secure any further line up?

A. I did not.

Q. Did you spend some time at the scene of the first accident at Rich Valley?

A. Yes, I spent most of the evening there.

Q. And then what did you do?

A. Well, I returned home and relieved. I was held at the corner of the first accident until nine thirty or ten o'clock that evening.

Q. Then you say you returned home?

A. Yes.

Q. To Empire?

A. Yes.

Q. Did you use your speeder?

A. Yes.

Q. Were you alone?

A. Yes.

Q. You went down the track from Rich Valley to Empire?

[fol. 32] A. Yes.

Q. Where were you that day when No. 8 went by to the south?

A. I was about two and a quarter miles north of Rich Valley where I met No. 8.

Q. About what time of day was that?

A. About three fifty five.

Q. What were you doing at the time you met No. 8?

A. I merely set my car out to let No. 8 by.

Q. It was then daylight?

A. Yes.

Q. And you saw 8 coming?

A. Yes.

Q. You are out on the track practically every day of the year, are you?

A. Yes.

Q. This No. 8 is a passenger train on the road, is it?

A. Yes.

Q. And you know the regular time for that train to go through?

A. Yes.
Q. When is that?
A. At Empire it is four naught seven.
Q. 4:07?
A. Yes.
Q. That is the regular time for No. 8 to go through?
A. Yes.
Q. Now No. 8 going south, what has been your experience with that train as to whether or not it would be on time?

[fol. 33] Mr. Stearns: I suppose that is calling for a conclusion?

A. Regularly on time.

Mr. Stearns: O, well, all right.
Mr. Stassen:

Q. Pardon me?
A. She is practically always on time, she very seldom starts out of Minneapolis late.
Q. You have observed that during your years on that beat?
A. Yes.
Q. You state that when you saw No. 8 coming to meet you north of Rich Valley you stopped and set your car off the tracks?
A. Well, I had the time, I knew what time she was due there, so I set my car off before I even seen it.
Q. You knew it was coming because you knew the time it was due?
A. Yes.
Q. That is the way you knew you should stop and take your car off?
A. Yes.
Q. So over your years of experience, you knew when 8 was to come through there?
A. Yes.
Q. You kept your car off the track until she went by?
A. Yes.
Q. And then you went to Inver Grove?
A. Yes.
Q. And did this work you testified about?
[fol. 34] A. Yes.

Q. In returning from Rich Valley that evening, at 9:30 or 10 o'clock to Empire, you proceeded on your motor car in the same manner?

A. Yes.

Q. Riding this motor car, you face what direction?

A. Whatever direction I am going.

Q. You face the direction in which you are traveling?

A. Yes.

Mr. Stassen: You may question.

Cross-examination.

Mr. Stearns:

Q. This Plaintiff's Exhibit B is the line up you get at what time?

A. I get it off the depot about one o'clock, 1 P. M.

Q. Who do you get it from?

A. From the agent.

Q. As a part of your duties, it was necessary for you to get the line up from the agent, or train dispatcher?

A. Yes.

Q. And that line up, Plaintiff's Exhibit B, is known as the regular line up?

A. Yes.

Q. What is the first line up you get in the morning?

A. Seven fifty.

Q. How long is that line up good for?

[fol. 35] A. One hour.

Q. What do you mean by line up?

A. The trains moving on the tracks inside that time.

Q. In other words, what you do is to find out from the agent, or train dispatcher, when trains are coming on the track on which you want to work?

A. Yes.

Q. That line up was good for one hour only?

A. Yes, that is what it states.

Q. That is provided by your rules and regulations, isn't it?

A. Yes.

Q. Plaintiff's Exhibit B, which is the line up you received December 8, 1933, was good for one hour?

A. Yes.

Q. Under instructions from your company?
A. Yes.
Q. That line up you showed to Mr. Rambo?
A. Yes.
Q. As far as you know, you do not know whether he got any other line up?
A. No.

. . . . . .

Q. Your hand speeder is such that when a train is coming you take it off the track?
A. Yes.
Q. And you operate it to and from your home, or do you?
A. Not to and from work to my home.
[fol. 36] Q. Where is your hand car left?
A. In the tool house.
Q. And is that tool house cared for by you?
A. Yes.
Q. That is on your district?
A. Yes.
Q. You take care of your lanterns yourself?
A. Yes.
Q. Do you know whether or not Rambo had a tool house?
A. He did have.
Q. Did he handle his tool house, care for it in the same manner as you do?
A. Yes.
Q. Was he provided with lanterns?

. . . . . .

Q. Do you know whether or not he was provided with lanterns?
A. He was.
Q. When sunset comes on in the operation of your speeder do you use a lantern?
A. Yes.
Q. What lantern do you use?

Mr. Stassen: Object to this line of inquiry as immaterial.
The Court: Overruled.

A. A kerosene lantern.
Q. Describe that.

A. It is a small lantern, a regular railroad lantern, with a round globe, and a small fountain of kerosene in it, with a small wick, about a fourth inch wick.

[fol. 37] Q. Where do you put that lantern?

A. On the car.

Q. Where?

A. We generally hang the red lantern on the back and the white lantern in front.

Q. And you do that under instructions from your employer?

A. Yes.

Mr. Stassen: Objected to as not the best evidence, incompetent, and immaterial.

The Court: Do you know whether they are oral or written?

Mr. Stearns: We have all of them, we will put them in evidence, I will withdraw it.

Q. After sunset when you operate your speeder in the performance of your duties, you carry a lantern on your speeder?

A. Yes.

Mr. Stassen: Object to that as immaterial.

The Court: He was not involved in this accident.

Mr. Stearns: No, but he is a signal maintainer, they are all under the same instructions.

Q. Is your work the same type and character as Rambo's work was?

A. Yes.

Q. You operate your speeder for the purpose of doing your work upon the tracks in taking care of your duties?

A. Yes.

Q. Did Rambo operate his speeder for that purpose, too?

[fol. 38] A. Yes.

Q. Do you know whether or not you received any instructions with reference to carrying lanterns?

A. Yes.

Q. What were those instructions?

Mr. Stassen: I ask leave to question for the purpose of forming a foundation for objection.

Mr. Stearns: Go ahead.

Mr. Stassen:

Q. Were all instructions you received from the company written?

A. Yes.

Mr. Stassen: Object to the question as immaterial, and not the best evidence.

The Court: Answer may stand.

Mr. Stearns: Will the reporter read the question?

(Question read by reporter.)

Q. Were they printed or verbal?

A. Printed.

Q. Showing you Defendant's Exhibit 1, consisting of seven pages, each marked Defendant's Exhibit 1, I will ask you what that is?

A. Regulation for the operation of motor, hand, push, trailer, and velocipede cars.

Q. Those are printed rules of the Chicago Great Western road, printed instructions?

A. Yes.

Q. What date?

A. Revised November 1, 1932.

Q. Did you operate your hand car in the performance of your duties under those instructions?

[fol. 39] A. Yes.

Mr. Stassen: Objected to as immaterial, and improper cross-examination.

The Court: Sustained.

* * * * * * *

Q. Did you work with Rambo under the same supervisor?

A. Yes.

Q. This line up you speak of, being Plaintiff's Exhibit B, you say that was good for one hour?

A. Yes.

Q. What time was No. 8 due at Empire?

A. 4:07.

Q. No. 8 is not included in that line up, Plaintiff's Exhibit B?

A. No, that is standard regular time trains.

Redirect examination.

Mr. Stassen:

Q. You say that No. 8 was a standard regular time train?
A. Yes.
Q. Is that ever included in your line up?
A. It says "Passenger trains on time" unless they are late, then it would be included as to how late they are.
Q. The 12:50 line up never does show No. 8?
A. No, not unless it is specified late out of stations starting from.
Q. St. Paul or Minneapolis?
A. Yes, of course, they did not know it at that time that would be later.
[fol. 40] Q. So day after day, as you work upon your line, you get out of the way of No. 8, because you know when she is coming through?
A. Yes.
Q. Not because of anything that shows on your one o'clock line up?
A. Unless it states she will be late due to some reason.

Recross-examination.

Mr. Stearns:

Q. In the station at Empire you state there is a telephone?
A. Yes.
Q. When you get your line up of trains, from whom do you get it?
A. In the morning I get it right in my own house, there is a dispatcher phone right in the house along the line where I get it, at each station there is a phone.
Q. Does that connect you with the train dispatcher?
A. Yes.
Q. This line up you got December 8 did you get that from the agent or train dispatcher?
A. The agent.
Q. Do you make a practice of securing line ups for yourself?
A. Yes.

Redirect examination.

Mr. Stassen:

Q. This line up you say you got was one of the regular two line ups that day?

[fol. 41] A. Yes.

Q. One you got at 7:50 and one at 12:50?

A. Yes.

Q. These line ups do not show regular trains that are on time?

A. No, not on time, the time card regulates that.

Q. Those were the only two line ups you got that day, December 8, 1933?

A. No, I generally call up and ask the dispatcher if there is anything late or if there is anything closed.

Recross-examination.

Mr. Stearns:

Q. No. 8, at the time you got this line up, had not even arrived at St. Paul?

A. No.

Q. When you get the line up of No. 8 you get it when it leaves St. Paul?

A. Or Minneapolis.

Q. And No. 8 is the train involved in the Rambo case?

A. Yes.

(Witness excused.)

JOHN FELTON, being called as a witness on behalf of the plaintiff, was first duly sworn, and testified on direct examination as follows:

Examined by Mr. Stassen:

Q. What is your name?

[fol. 42] A. John Felton.

Q. F-e-l-t-o-n.

A. Yes.

Q. How old are you?

A. Forty-seven.

Q. Where do you live?

A. Minneapolis.
Q. What address?
A. 891 Thirtieth Avenue, S. E.
Q. You are employed as a fireman by the Chicago Great Western.
A. Yes.
Q. And have been employed as such for how long?
A. Twenty-eight or twenty-nine years.
Q. Were you the fireman on No. 8?
A. Yes.
Q. Going south on December 8, 1933?
A. Yes.
Q. You started from Minneapolis on that run?
A. Yes.
Q. And your crew stops at Oelwein?
A. Yes.
Q. The crew that starts out in Minneapolis?
A. Yes.
Q. Do you remember the eighth day of December, 1933?
A. Do I remember what?
Q. Do you remember the eighth day of December, 1933?
A. Yes.
Q. What time did you leave St. Paul?
[fol. 43] A. We are due out at 3:30, but we were seven or eight minutes late.
Q. You were seven or eight minutes late?
A. Yes, depot in St. Paul.
Q. But you were seven or eight minutes late?
A. Yes.
Q. That would make it 3:37 or 3:38?
A. Yes.
Q. And leaving St. Paul did you come to South St. Paul and Inver Grove?
A. Yes.
Q. And then did you go up hill to Rich Valley?
A. Yes.
Q. And as you went through Rich Valley and crossed the highway to the south what were you doing?
A. Putting in fire.
Q. Putting fire in your locomotive?
A. Yes.
Q. And what happened?

A. Well, before I put in the fire I looked down, and I did not see no cars on my side so I started working and kept working until we hit that truck.

* * * * * * *

Q. What happened to your locomotive as a result of hitting this truck?

A. Well, one thing we knocked the pilot off.

Q. What is the pilot?

A. The cow catcher.

Q. What?

A. The front of the cow catcher.

[fol. 44] Q. Commonly known as the cow catcher?

A. Known as the cow catcher on the pilot, on the cross beam.

Q. Where does this pilot fit on the end?

A. On the cross beam.

Q. Is that the very front end of the engine?

A. Yes, the front end of the engine.

Q. And is that the furthest forward portion of the locomotive?

A. Yes.

Mr. Stearns: I presume at this time we might make an objection to this testimony. The absence of the pilot at the time of the Rambo accident could not have been the proximate cause of Mr. Rambo's death and we object to all this line of testimony as incompetent, irrelevant and immaterial.

The Court:

Q. What is the pilot?

A. Well, it is supposed to be——

The Court:

Q. We do not care what it is supposed to be, what is it?

A. It is called a pilot, a cross beam on the front of the locomotive.

Q. Where is it located?

A. In the front.

Q. Tell us where it is?

A. It is a cross beam in front of the locomotive, the cow catcher is fastened on this beam.

Mr. Stassen:

Q. How high above the ground is it?

[fol. 45] The Court: I don't know whether I can rule on that or not. I do not know where the pilot is, or whether that had anything to do with the accident.

Mr. Stearns: At this particular point there is no evidence as to speed of the train. I suppose that might be answered at this time and I will withdraw my objection.

The Court: All right, the objection is withdrawn.

Mr. Stassen:

Q. How high above the ground is the cow catcher?

A. I could not really tell you how high it is, I never measured one.

Q. Can you tell us approximately how high above the ground this cow catcher is?

A. Well, I never measured one, but it seems it goes up to me about here (indicating), when I stand by it, I never measured one.

Q. It goes up about as high as your chest?

A. When I stand on the level.

Q. That is the upper part of it?

A. The pilot beam.

Q. The pilot beam, from there on down?

Q. The cow catcher fits in front of that from there on down.

Q. Is it straight across or V-shaped?

A. It is a V-shape.

Q. A V-shape?

A. Yes, a V-shape.

Q. A V on two sides, it slopes back on either side?

[fol. 46] A. Yes, it slopes back on either side.

Q. Approximately how far from the track is the bottom part of it?

A. I think around four or five inches, something like that, or more.

Q. And does it slope out forward, back or straight?

A. It is straight.

Q. Does it slope out forward?

A. Yes.

Q. So then we have a device V-shaped and sloping towards the front of this locomotive?

A. Yes.

Q. Coming from a height near your shoulder to a few inches above the track?

A. Yes.

Q. You say that device was not off at the time of this first accident?

A. Yes.

Q. When you hit the truck?

A. Yes.

Q. You have ridden locomotives a good many miles, I suppose, as a fireman?

A. I have.

Q. Have you observed locomotives hit objects on the track before?

* * * * * * *

A. I have seen them hit objects sometimes, cattle, stock, and so forth.

Q. What happens to objects upon the track when a locomotive with a pilot on it hits it?

* * * * * * *

[fol. 47] Q. You may answer the question.

A. They throw it off the track by that pilot, the pilot generally throws them off to the side.

Q. You say the pilot generally throws it off to the side?

A. Yes.

Q. When this pilot was knocked off at Rich Valley, can you then describe how the front of that train and lower portions of it would work?

A. If the pilot——

Q. If the pilot were knocked off?

A. It was straight down then, straight down to the front.

Q. After this pilot was knocked off at Rich Valley, was there anything in front of the wheels?

A. Just the beams.

Q. How high is the beam?

A. Well, there is your truck frame and wheels and your beam above the truck frame.

Q. By truck frame do you mean the device upon which the wheels are fastened?

A. Yes.

Q. The cross beam is of steel?

A. Yes.

Q. And the wheels are on the sides?

A. Yes. Well, the wheels are fastened on the cross beams, fastened on the frame of the engine.

Q. I ask you whether or not the lower front of the locomotive was then open after this pilot was knocked off?

A. As high as the wheel, as the axel on the wheel, that would be the center.

[fol. 48] Q. At that point would be the axel?

A. Yes.

Q. And above that what would the condition be?

A. There would be the cross pilot beam.

Q. That is the beam you refer to as being the height of your chest?

A. Yes; where this cow catcher is fastened on.

Q. Where the cow catcher is ordinarily fastened on?

A. Yes.

Q. Did you leave this pilot at Rich Valley when you proceeded south that day?

A. Yes.

Q. Was it knocked completely off, or did you or other members of the crew unfasten it?

A. It was knocked completely off.

Q. When you had the first accident at Rich Valley, I will ask you whether or not the head light on that locomotive was burning?

Mr. Stearns: Objected to as incompetent.

The Court: The objection is incompetent. You may answer.

Mr. Stearns: We make the objection that it is incompetent, irrelevant and immaterial if the Court please.

The Court: Your objection is sustained.

Q. This No. 8 locomotive that night, of December 8, was equipped with a headlight, was it not?

A. Yes.

Q. When was the headlight turned on?

Mr. Stearns:

[fol. 49] Q. If you know?

A. I do not really just know what time it was turned on, I could not say. The engineer does that, he turns it on at sundown.

Q. You say on that night you have no recollection as to when it was turned on?

A. It was daylight when we left South St. Paul, 3:30, and it was getting dusk.

Q. Was it on or not when you left St. Paul?

A. I am not sure, I think the cab lights were burning out of St. Paul, I cannot remember just the time, but it seems to me that the cab lights were burning and the apron and head lights were turned on when leaving St. Paul.

Q. There are two brightnesses to this headlight, are there not?

A. Yes.

Q. Dim and bright?

A. Yes.

Q. Are there more than two different degrees of brightness?

A. Is there any difference? Yes; a difference in the dimmers.

Mr. Stearns:

Q. He asked you if there are more than two?

A. No; two lights on each side of the engine, they dim too with the headlight.

Mr. Stassen:

Q. Is there a dim and strong dim?

A. A strong light and a dim light.

Court adjourned at this time until 1:30 May 23, 1934.

[fol. 50] May 23, 1934.

1:30 session, pursuant to adjournment, all parties present.

JOHN FELTON, being recalled, testified on further direct examination, as follows:

Examination continued by Mr. Stassen:

Q. Now, Mr. Felton, just before the noon hour, we had begun a discussion of the lights on your locomotive on the

night of December 8, 1933, on Train No. 8. When was this light first turned on?

A. We generally turn the cab lights on at the Union Station, I am sure they were turned on.

Q. That is the lights inside of the cab where you and the engineer are?

A. The lights inside of the cab, the engineer turns them on.

Q. Those cab lights were turned on inside the Union Station at Minneapolis?

A. St. Paul.

Q. When was the head light turned on?

A. Well, the dimmers go right on, that is the dimmers go on with them.

Q. The dimmers go on on the same switch?

A. Well they have a separate switch too.

Q. Well, that locomotive you had that night was there a separate switch on that, or was that the same switch?

A. The light stays on in the cab and the dimmers go on.

Q. The dimmers go on with the cab lights?

[fol. 51] A. They do.

Q. When were the lights turned on bright, if at all?

A. As soon as it became dusk.

Q. Well, on this night of December 8, when were the lights turned on bright?

A. I think after leaving Rich Valley.

Q. You think after leaving Rich Valley?

A. At Rich Valley, I am not just certain on that though, I cannot remember just exactly when it was they were turned on, the engineer handles that.

Q. Well, when you are firing, it is also your place to watch the signals every so often?

A. Yes.

Q. And if you are not putting in a fire, you have to sit on the opposite side of the engineer, and look down the track?

A. Yes.

Q. Now, what is your recollection as to when these lights were turned on bright that night?

A. Well, they show up better when it gets dark, they show up better ahead.

Q. Well, there is a very distinct difference between bright and dim on these lights, isn't there?

A. There is.

Q. The dim light throws a very faint amount of light forward?

A. It is a smaller volume of light.

Q. It is a much smaller volume of light, is it not?

A. Yes.

[fol. 52] Q. And you cannot see very far ahead by those dim lights, can you?

A. No; not very far.

Q. On that locomotive you use on No. 8?

A. That is right.

Q. And with the bright lights, they cast a light a great distance ahead of you?

A. Yes.

Q. So that you at any time you were looking out the side of this locomotive would know right away whether the lights were on bright or dim, would you not?

A. In darkness it shows up better than when it is lighter.

A. I say in darkness it shows up better than when it is lighter.

Q. Now you testified that you believe they were turned on bright at Rich Valley?

A. I do.

Q. Before or after the first accident?

A. I cannot recall.

Q. You cannot recall?

A. No, I cannot recall just when they were turned on bright,

A. I cannot say just when.

Q. You cannot say just when they were turned on bright?

A. No.

Q. How long were you delayed at the scene of the first accident?

A. About one hour or so.

Q. Do you know what time you left the scene of the first accident?

[fol. 53] A. It must have been around 4:05.

Q. Five minutes after four you mean?

A. Yes; when the accident happened.

Q. When the accident occurred it was five minutes after four about?

A. About that, yes.

Q. And you stayed there about one hour?

A. Yes, about one hour.

Q. Do you know at about what time you left Rich Valley after the first accident?

A. Well, we were about one hour late.

Q. About an hour late, around 5:05?

A. I know we were at Hampton around—I do not know just when we did go through Hampton, I cannot recall just when we went through Hampton.

Q. You say you cannot recall just when you went through Hampton?

A. Not to the minute, I cannot, it was around 5 o'clock, something after five maybe.

Q. When you left Rich Valley, how far could you see by natural light?

A. By natural light?

Q. By natural light—daylight?

A. O, I could see a ways, I don't know just how far I really could see, I cannot recall that how far, I just would not say how far, it was pretty dark when we left Rich Valley, it had commenced getting dark then.

Q. Could you see half a mile by daylight?

A. I suppose so, if it was a large enough object.

Q. Could you see an object the size of a man half a mile away by daylight?

[fol. 54] A. I could not say now whether I could or not, I do not remember.

Q. Was there any change made in the lights on your locomotive on that trip after you left Rich Valley?

A. Not as I saw.

Q. Not as you saw it?

A. Not as I saw it.

Q. About how frequently did you look out?

A. Between every fire that I put in.

Q. And at least at every block?

A. Well it depends on how often I fire.

* * * * * * *

Q. On No. 8 that night, after you left Rich Valley, did you look at every signal block, and call it to the engineer?

A. I did, yes.

Q. You did.

A. Yes.

Q. About how far apart are these signal blocks?

A. There is a difference.

Q. About how far apart are these signal blocks approximately, on that run between Rich Valley and Hampton?

A. Two miles, three miles, maybe more.

Q. What is known as coming over the hill on that run on No. 8?

A. Well, if we start at the foot of the hill to get to the top of the hill we say we are going over the hill.

Q. On that run starting from St. Paul going toward Rich Valley?

[fol. 55] A. Upgrade.

Q. Where is the hill?

A. Around Inver Grove, it starts gradually, and up to three, four miles west of Rich Valley.

Q. There is an upgrade all the way?

A. All the way up?

* * * * * * *

Mr. Stassen:

—. Mr. Felton, you were questioned regarding these lights at the inquest conducted here at Hastings on the eighteenth of December 1933?

A. I do not remember.

Q. A matter of about ten days after the accident?

A. I cannot remember that.

Q. You cannot remember the date you mean?

A. Of the eighteenth.

Q. You remember being down here at the court house at an inquest?

A. If that was on the eighteenth of December I must have been here.

Q. Well, the exact date is not important, but you remember being down here?

A. Yes.

Q. And at that time the question of lights on the locomotive was gone into.

(No answer.)

Q. Do you remember being asked a question in regard to the headlight? "Question—When was it turned on bright? Answer—I believe at St. Paul, either coming over

the hill or I could see them, I believe, when it became dark." Do you remember that?

[fol. 56] A. When it became dark they were on, they are always on.

Q. Do you remember being asked that question and giving that answer?

A. I cannot remember it.

Q. Would you say at that time you believed the light was turned on bright at St. Paul?

A. I cannot remember.

Q. You do not remember?

A. No.

Q. Well, Mr. Felton, have you any distinct recollection on this particular night in this particular train as to whether or not, if at all, that locomotive light was turned on bright?

A. It was bright going through Hampton.

Q. You say now it was bright going through Hampton?

A. It was bright going through Hampton.

Q. Well, have you any distinct recollection as to whether or not it was turned on bright?

A. I did not see when he turned it on, but the light was bright going through Hampton.

Q. Have you any recollection as to when you first saw it was on bright?

A. I cannot recall as to when I first saw it was on bright.

Q. Now, after leaving Rich Valley, you proceeded south or southeast down through Empire?

A. Uh Huh.

Q. And on through Hampton?

A. Uh Huh.

Q. And what did you first notice with reference to the second accident?

[fol. 57] Mr. Stearns: You mean now the Rambo accident?

A. Yes.

Q. What first attracted your attention?

A. I knew we hit something.

Q. You knew you hit something?

A. Or ran over something.

Q. Pardon me, I did not hear that.

A. I knew we hit something, or ran over something.

Q. What were you doing at that time?

A. I was putting in a fire.

Q. And when you are putting in a fire, where are you located?

A. On the deck of the engine, left side of the fire door.

Q. And are you down lower than the windows out which you look?

A. Well, I am right by the boiler.

Q. And where is the seat you use when you are not putting in a fire?

A. Right in the back of me.

Q. In the back of you?

A. When I stand to put in the fire, it is right back of me.

Q. So it is your testimony, that the first thing you knew, the first thing that attracted your attention with reference to the Rambo accident, was when you knew you had hit something?

A. Yes.

Q. What did you see or hear?

A. It sounds different on the deck, I knew we run over something.

[fol. 58] Q. You could hear something under the deck?

A. I could hear the engine going over something, it was kind of a peculiar noise, different from the regular sound.

Q. Did you see anything?

A. After that I stood up and looked out, and I saw a flash of fire then.

Q. You saw a flash of fire?

A. I saw a flash of fire flying up on the side of the cab.

Q. Are those two things, seeing the flash of fire and hearing the noise, the unusual noise underneath the wheels, the first things that attracted your attention with relation to the Rambo accident?

A. Yes.

Q. Where was the engineer at that time?

A. He was sitting on the seat looking out.

Q. You say he was sitting on the seat looking out?

A. Yes.

Q. Which side does he sit on?

A. The right side.

Q. Do you know in what direction he was looking?

A. I could not say, but it looked to me as though he was looking straight ahead.

Q. What was the condition as to daylight or darkness at that time?

A. It was dark.

Q. Could you see any distance at all by natural light?

[fol. 59] Mr. Stearns: I suppose that is calling for a conclusion, if it was dark at that time. He said the headlight was on. I do not see how he could testify as to natural light.

The Court: You may answer.

A. No.

Q. After you noticed the unusual noise and flash of light, what did you next observe with reference to the accident in the operation of the train?

A. I notice the brakes going on a little before, a trifle before, if that is plain.

Q. Did you notice anything else after observing these two things?

A. I notice the brakes going on and the train coming to a stop.

Q. The train came to a stop?

A. Yes.

Q. What is the effect inside the cab of putting on the brakes of a train?

A. Grinding of the brake shoes on the wheels.

Q. You can hear that?

A. Yes, you can hear the grinding of the brake shoes on the wheels, and it gives a warning on the brake valve.

Q. What kind of a warning?

A. It is a warning, kind of a little different noise, you can tell when they set the brakes, it gives a different noise on the brake valve, a sharp noise.

Q. And what is the effect if the brakes are put on in emergency?

Mr. Stearns: Objected to as incompetent, irrelevant and [fol. 60] immaterial, no sufficient foundation laid to show this man is an expert.

Mr. Stassen: I will lay a further foundation. I withdraw the question.

Q. How many years have you railroaded for the Great Western?

A. Twenty-eight or twenty-nine years.

Q. How many of those years did you spend riding a locomotive for the Great Western?

A. Since 1906.

Q. So for twenty-seven years you have been riding a locomotive for the Great Western, is that right?

A. Yes.

Q. Have you sometimes been an engineer on a freight line?

A. I never was promoted.

Q. You know when you are on a train when the brakes are set in emergency?

A. Yes.

Q. How do you know?

A. It takes a different part on the brake valve.

Q. You say it takes a different part on the brake valve?

A. Yes.

Q. How many times have you been riding on locomotives for the Great Western when brakes have been set in emergency?

A. Any time they see fit, I would say.

Q. Can you tell us how frequently that has occurred in the past twenty-six years?

A. Lots of times, when spotting for water and so forth, [fol. 61] I cannot tell you just how many times, but lots of times.

Q. Have you ridden this same locomotive you had that night on No. 8 on other occasions when the emergency brake was applied?

A. They use it on all of them.

Q. Do you know whether or not this was the locomotive used frequently on this passenger run?

A. Not any more than the rest, if necessary.

Q. Than the rest in the service?

A. Not any more than the rest, they use it in case of emergency.

Q. They use what in case of emergency?

A. The emergency brake.

Q. You know what the effect inside the cab is of putting on the emergency brake of that locomotive you were using that night on No. 8?

A. You stop a whole lot quicker.

Q. It makes it stop a whole lot quicker?

A. It seems to me it does.

Q. Is there anything you can hear when that emergency brake goes on in the cab?

A. There is a greater noise than otherwise.

Q. What is the effect upon a man standing in the cab when the emergency goes on if you are traveling at sixty miles an hour?

A. I do not know of any.

Q. Pardon me.

A. I do not know of any effect on a man standing in the cab.

Q. What effect does it have on the forward motion of the train?

[fol. 62] A. I don't know of any difference.

Q. Pardon me.

A. Only she hangs faster and quicker is all.

Q. And by "hangs" what do you mean?

A. That is they go on harder.

Q. The brake shoes you mean, hang on to the wheels harder?

A. Yes; the brake shoes hang on to the wheels harder.

Q. Well, if you were riding on No. 8 that night, with that locomotive in the cab, and you were blindfolded so you could not see the engineer, could you tell when the emergency brakes went on?

A. Yes; I can hear it, unless they take my hearing away.

Q. Now, was there anything unusual in the operation of that train that night in connection with the second accident that you observed, apart from the unusual noise under the wheels, the flash of light, the putting on of the brakes, and coming to a stop?

A. Yes.

Q. Was there anything else?

A. No.

Q. That is all?

A. And he whistled.

Q. Did you hear the whistle?

A. Uh.Huh.

Q. When did you hear that?

A. A little before the accident I heard him too.

Q. You heard the whistle before the accident?

A. Yes; before the accident I heard him toot.

[fol. 63] Q. I understood you to testify that the first thing you noticed was the noise under the wheels?

A. That is the first thing I noticed.

Q. Then the toot?

A. That was the first thing you asked me.

Q. I asked you what you first noticed. Did the whistle come after the noise under the wheels or before?

A. Before.

Q. When you noticed the whistle?

A. I heard it.

Q. You say you heard it?

A. Yes.

Q. Just the same as you heard the noise under the wheels?

A. Yes.

Q. Well, then what was the first thing you noticed with reference to the Rambo accident?

A. It seemed it all come in together there.

Q. You say it all seemed to come in together there?

A. It all happened so quick.

Q. You say it all happened so quick, do you mean that these various noises of unusual grinding of the wheels, the flash of light, the setting of the brakes, and the tooting of the whistle, all seemed to come together?

A. Well, it was close together anyway.

Q. And then you say your train was brought to a stop.

A. Yes.

Q. What did you do then?

[fol. 64] A. Put the fire out, the side curtains were on fire.

Q. The side curtains caught fire?

A. The side curtains caught fire.

Q. By side curtains, do you mean the curtains where you sit on the locomotive?

A. Between the engine and tank.

Q. And after putting out that fire what did you do?

A. I took care of the rest of my fire in the engine, and watched other stuff.

Q. As the train was brought to a stop did you talk to the engineer?

A. I asked him what we hit?

Q. What did he say?

A. I cannot remember that either.

Q. You cannot remember what he said?

A. He was on the—I says "what did we hit now" I cannot remember what he did say.

Q. You cannot remember what he said?
A. No.
Q. Did you stay with the locomotive then?
A. Yes.
Q. You did not go back along the tracks at all?
A. No.
Q. How long did you stop at the scene of this accident?
A. I cannot recall that, it was twenty or thirty minutes.

Mr. Stassen: You may inquire.

[fol. 65] Cross-examination.

Mr. Stearns:

Q. Do you know what time No. 8 left St. Paul on December 8, 1933, the day of the accident?
A. Seven or eight minutes late on their schedule.
Q. What time was their regular schedule leaving St. Paul?
A. 3:30.
Q. After you left Rich Valley you had firing to do?
A. Yes.
Q. In firing the locomotive, you had to go back to the tender with a shovel?
A. Yes.
Q. And throw a shovel full of coal into the boiler?
A. Yes.
Q. And the engine was in motion all that time?
A. Yes.
Q. You did not see Rambo before he was killed?
A. No.
Q. So you did not know an accident was going to happen?
A. No.
Q. You were firing the engine at the time of the accident?
A. Yes.
Q. You were not paying any attention to what the engineer was doing?
A. Not a bit.

[fol. 66] Q. Now, on this head light, have you ever made any test to determine how far you could see from your position in the cab after sundown with the lights on dim and with the lights on bright?
A. I never made any such test, no.
Q. You say it was dark at the time of the accident?
A. Yes.

Q. You do not know how long before the accident occurred to Rambo the whistles was blown?

. . . . . .

Q. Answer the question, do you know how long before the accident occurred to Rambo the whistle was blown?

A. I do not know just how long, no.

Q. Do you know how fast the engine was traveling?

A. I would judge about sixty.

Q. Was it on a straight or curved track?

A. It was on a straight track.

Q. Was it down hill or up hill?

A. It was down hill.

Q. Do you know the grade at the point of the accident, and north of it?

A. Yes, it is on a down grade going east and an up grade going north.

Q. Do you know what grade it is?

A. No, I do not.

Mr. Stearns: That is all.

(Witness excused.)

[fol. 67] PETER GRAMLING being called as a witness on behalf of the plaintiff, was first duly sworn, and testified on direct examination as follows:

Examined by Mr. Stassen:

Q. What is your name?

A. Peter Gramling.

Q. How old are you?

A. I will be sixty-seven my next birthday.

Q. You live in St. Paul?

A. Yes.

Q. You work for the Chicago, Great Western?

A. Yes.

Q. As an engineer?

A. Yes; as an engineer.

Q. You were the engineer on No. 8 coming out of Minneapolis and St. Paul the night of December 8?

A. Yes.

Q. Did you leave Minneapolis at 2:30?

A. Left Minneapolis at 3 o'clock.

Q. You left Minneapolis at 3 o'clock?
A. Yes.
Q. Your schedule is 3:30 out of St. Paul?
A. Yes.
Q. What time did you leave on that evening?
A. Left there about seven, eight minutes late.
Q. Do you know the reason you were seven or eight minutes late?

Mr. Stearns: Objected to as immaterial.
The Court: Sustained.

[fol. 68] Q. Then you came out through South St. Paul and Inver Grove, and upgrade towards Rich Valley?
A. Yes.
Q. Coming past Rich Valley station, do you know what time it was?
A. About 5:05, 4:05 rather.
Q. By that you mean five minutes after four?
A. Yes.
Q. And as you proceeded south of Rich Valley station, how fast were you going?
A. About fifty.
Q. You mean by that, fifty miles an hour?
A. Yes.
Q. What happened?
A. We hit a truck on that private crossing east of Rich Valley.
Q. You say you hit a truck on that private crossing east of Rich Valley.
A. Yes, we hit a truck on that private crossing east of Rich Valley.
Q. Then what did you do?
A. Well, we cleaned up the remains and got the truck out of the track and took the remains down to the depot.
Q. What remains?
A. The party that got killed there.
Q. You backed up then to the depot?
A. Yes.
Q. Then what did you do?
A. I think they notified the coroner.
Q. What else did you do?
[fol. 69] A. Waited there until he showed up.
Q. Then what did you do?
A. Then we left there.

Q. What time did you leave?
A. I think it was between forty-five and fifty.
Q. You mean by that between forty-five and fifty minutes after four?
A. Yes.
Q. What was the condition as to daylight or darkness at the time you left Rich Valley?
A. It was dark, pretty dark, it was getting quite dark.
Q. You then proceeded south?
A. Yes.
Q. On the track through Empire?
A. On the track through Empire.
Q. To Hampton?
A. Yes, to Hampton.
Q. What happened to your pilot in the first accident?
A. We broke the pilot.
Q. How badly was it broken?
A. Well, we pulled the rest of it off, so it would not be dragging on the ground, going underneath.
Q. Then as I understand it, that left you without any pilot at all?
A. Yes.
Q. Did you receive train orders at St. Paul that day?
A. I do not think so, we only got a clearance.
Q. You got a clearance?
A. A clearance card.
[fol. 70] Q. Your orders came from Minneapolis?
A. I do not think we got any orders from Minneapolis, if we do we get them at South St. Paul?
Q. O, you get them at South St. Paul?
A. Yes.
Q. And after leaving South St. Paul, did you get any further train orders up to the time of the Rambo accident?
A. Yes; I think we got orders to meet No. 7.

Mr. Stearns:

—Just a moment, he just asked you if you got train orders.
A. I think we did.
Q. Where did you get them?
A. I think at Rich Valley, if I am not mistaken. I would not say for sure.
Q. Were your orders in writing?
A. They are always in writing.

Q. Did you get these orders before or after that first accident?

A. What do you mean?

Q. The Rich Valley orders.

A. If we got any there, we got them after, I could not say positively whether we got any there, I think we did though.

Q. If you got any, you got them after the accident?

A. After.

Q. Has the station at Rich Valley, equipment to give you orders on the fly?

A. No sir; it is a closed station.

Q. There is no operator there?

[fol. 71] A. No sir.

Q. And there wasn't any on December 8?

A. Only on the telephone there.

Q. A telephone that you can get hold of?

A. Yes.

Q. Well, then your orders, if you got any at Rich Valley, would not be written?

A. The conductor writes them.

Q. O, the conductor writes them out?

A. Yes.

Q. So when you get them, they are written?

A. Yes; they are written when I get them.

Q. Now, from Rich Valley south you go through Empire?

A. Coates, and then Empire.

Q. Is Coates an open station?

A. No.

Q. Is Empire an open station?

A. During the day, yes.

Q. Up to what time?

A. I do not know, it is open from eight to six.

Q. Is there a device at Empire to give you orders on the fly?

A. If there is any there.

Q. If there is any what?

A. If there are any orders there, he has the board.

Q. What is the board?

A. Order board, semiphore you might call it.

Q. There is a semiphore in front of the station?

A. Yes; there is a semiphore in front of the station.

[fol. 72] Q. And that can be set a certain way?

A. Yes; either clear or against you.

Q. If it is against you what does it mean?

Mr. Stearns: I presume this all irrelevant to this case and immaterial.

The Court: Are you going to show its condition on that day, that it was set against him?

Mr. Stassen: No, I am going to show the device.

The Court: You may answer.

Q. What do you mean if this board is out?

A. If the board is out, there would be orders there, either orders or clearance card, and if it is down, it is clear.

Q. And if there are orders there, and the board is out, how do you receive them?

A. With a hoop.

Q. With a hoop?

A. Yes; with a hoop.

Q. Explain that?

A. The operator comes out and has a hoop with a clamp on it, and clamps them in there and hands them up to you.

Q. He clamps them in there?

A. Yes; he clamps the orders.

Q. In the clamp on the hoop?

A. Yes.

Q. Then who takes them to the train?

A. The engineer or fireman takes them and the brakeman takes them in the rear.

Q. The engineer or fireman takes them?

A. The engineer or fireman takes them on the head end, or the brakeman or conductor takes them in the rear.

[fol. 73] Q. O, he has more than one hoop then?

A. Yes.

Q. How fast can you be going when you take these orders?

Mr. Stearns: Object to that as incompetent, irrelevant and immaterial.

The Court: Does it appear that there was a man at the station to get these orders in the first place *at the station to get these orders in the first place* at the time the engine went through?

Mr. Stassen:

Q. When No. 8 went through Empire that night, was there a man at the station?

A. I think there was.

Mr. Stearns: You mean in the afternoon?

A. 5 o'clock.

(Question read by reporter.)

A. I think there was.

The Court: You may answer.

A. That is immaterial, sometimes we are going 25, 30 or 40 miles an hour and we get them, if you don't get them you stop.

Q. Is Hampton a night station, was it on December 8?

A. A night station?

Q. A night station?

A. No, sir.

Q. Was it a day station?

A. Yes; it was a day station.

Q. Was there a man at Hampton when you went through there that night?

A. Yes.

[fol. 74] Q. Is Hampton equipped with the same type device?

A. Order board.

Q. Hoops?

A. Board and hoops, if necessary.

Q. Did you receive any orders that night of December 8, at either Empire or Hampton when you went through there?

A. I could not say positively.

Q. Now after leaving Hampton, you proceeded south toward Randolph?

A. Yes.

Q. What did you first observe with reference to the second accident, the Rambo accident?

A. I saw something down on the track at first, when I noticed it, I thought it was a dog or two running down the track, when I got a little closer, I discovered it was a speeder, and I pulled the whistle. I gave a number of short blasts and the man on the speeder never turned or looked.

Q. How far ahead on the track was the object when it appeared to you to be a couple of dogs?

A. It might have been eight or nine car lengths, eight, probably seven.

Q. Seven, eight, or nine car lengths?

A. Yes.

Q. By that you mean railroad car lengths?

A. Yes.

Q. What did you do at that time?

A. I was watching ahead to see what it was, and I discovered it was a speeder.

Q. Just a minute, answer one question at a time. How [fol. 75] fast were you going when you saw what appeared to be a couple of dogs?

A. About sixty miles an hour.

Q. How far ahead of you was this object when you discovered it to be a speeder?

A. About five or six car lengths.

Q. By car lengths, you mean railroad cars?

A. Yes.

Q. Then you testified you gave a couple of toots on the whistle?

A. A number of them.

Q. Did you do anything else?

A. I used the brake in emergency.

Q. You used the brake in emergency?

A. I put the brake in the emergency.

Q. How soon did you do that after seeing that it was a speeder?

A. Immediately.

Q. How is that done on that locomotive?

A. All you do is to take the handle and flap it over in full emergency.

Q. You have a handle before you there?

A. Yes.

Q. As you sit in the cab, you have a brake valve handle?

A. Yes.

Q. To put that in emergency, you immediately turn it over at full blast?

A. Yes.

Q. And as you sit there, in your seat, where is your handle in relation to you?

A. Right in front of me.

[fol. 76] Q. Directly in front of you?

A. In front of me, kind of on the left hand side a little.
Q. And how do you blow the whistle?
A. By hand.
Q. What sort of a switch?
A. With a rope.
Q. Where is that located?
A. Right up over your head, that runs to the rod.
Q. Next to the rod?
A. It runs to the whistle rod.
Q. Now, at this point where the accident happened, what is the nature of the track as to straightness or curves?
A. It is straight.
Q. For how long a distance is that track straight?
A. About a mile and a half, a mile and three-quarters, it might be less, it might be a little less than a mile and a half, it might be a mile and a quarter.
Q. And do you mean that distance to be from the curve that you come around?
A. Down to the curve.
Q. Down to the curve?
A. Yes.
Q. How far is the track straight from the curve you come around to the point you hit the speeder, approximately?
A. About one mile, it might be three-quarters of a mile.
[fol. 77] Q. Were you looking ahead immediately before you saw what appeared to be a couple of dogs?
A. Absolutely.
Q. Were you looking ahead at all times from the time you rounded the curve until you hit the speeder?
A. Yes.
Q. Which direction was this speeder traveling in?
A. Towards Randolph.
Q. The same direction the train was going?
A. Yes.
Q. In what position was the man upon the speeder?
A. He was sitting down.
Q. Was he upright or otherwise?
A. He was sitting down, upright?
Q. While you observed him, did he or not, turn?
A. He did not turn.
Q. He did not turn at all?
A. No, sir.
Q. What happened to the speeder after you hit it?

A. It went all to pieces, I think.

Q. What was the condition as to daylight or darkness at that time?

A. It was dark.

Q. Could you see any distance at all by natural light at that time?

A. Very little.

Q. Did you notice any unusual noise under the wheels after you hit the speeder?

[fol. 78] A. Not very much, quite a bit when we ran over the stuff.

Q. There was quite a bit of noise when you ran over the stuff?

A. Part of it.

Q. That is what you refer to as grinding the speeder, breaking it up?

A. Yes.

(A five minute intermission was taken at this time.)

Q. Mr. Gramling, you have normal eyesight, and had normal eyesight on December 8, 1933?

A. Yes.

Q. Had your eyes been tested?

A. I wear glasses, my eyes had been tested.

Q. Was there any part of your locomotive, other than the pilot, damaged in the first accident?

A. No, sir.

Q. In the second accident?

A. Yes.

Q. What part?

A. It knocked off the left front cylinder cock.

Q. At the time you hit the speeder, did you notice anything unusual happening?

A. Only the explosion from the gasoline of the car.

Q. The explosion from the gasoline of the speeder created a flash of light.

A. Yes; the explosion from the gasoline of the speeder created a flash of light.

Q. After you hit the speeder?

A. Yes.

[fol. 79] Q. Did the side curtains on the locomotive catch fire?

A. Yes.

Cross-examination.

Mr. Stearns:

Q. Do you know the weight of this engine on No. 8 train?

A. No, sir, I do not.

Q. How many cars were attached to the engine?

A. Four.

Q. At the point of the accident, and for some distance back, was the grade level or up or down hill?

A. It was down hill.

Q. For how long a distance?

A. It is down hill there for about two miles.

Q. And you say that the track was straight up to about three-quarters of a mile or one mile from the point where Mr. Rambo was hit?

A. Yes.

Q. When did you turn the head light on?

A. At Rich Valley the head light was turned on, it was turned on at the St. Paul depot, but it was turned on full power, put on bright, before we left Rich Valley.

Q. When you left St. Paul it was turned on dim?

A. Yes.

Q. At Rich Valley it was turned on bright?

A. Yes.

[fol. 80] Q. Are there only two lights, that is, dim and bright?

A. Yes; there are only two lights, dim and bright, and then you can put it out all together if you want to.

Q. What time did you get into Empire?

A. You want the regular time, or the time we arrived there that night?

Q. That night?

A. Well, it is hard saying, I could not tell you the exact time.

Q. What time did the accident happen to Rambo?

A. 5:05.

Q. Do you know whether it was 5:05 or 5:10?

A. 5:10 I think it was.

Q. Your train was traveling sixty miles an hour?

A. Yes; sixty miles an hour.

Q. Do you know the down hill grade towards the point where Rambo was hit, do you know what grade that is there?

A. I do not.

Q. When you first saw the object on the track, which you said you thought was a couple of dogs, what did you then do?

A. I kept watching to see what it was.

Q. Did you apply your service brake?

A. Not then, not until I saw it was a speeder, then I used the emergency.

Q. How far were you from Rambo when you used the emergency?

[fol. 81] A. Five or six car lengths.

Q. I presume you did not measure that?

A. No.

Q. It might have been more or less?

A. It might have been more, it might have been less, it might have been a little more.

Q. What was the fireman doing at the time of the accident?

A. I think he was down putting in fire, I could not swear positively as to that, I think he was though.

Q. You were sitting on the right hand side in the seat box?

A. Yes.

Q. The emergency lever directly to the front and left of you?

A. Yes.

Q. So to pull the emergency, all you have to do is to reach and pull it?

A. Yes.

Q. And the whistle cord, where is that?

A. Right up over me.

Q. Within reach?

A. Within reach.

Q. When did you first blow your whistle?

A. When I saw it was a speeder.

Q. Did you blow your whistle more than once?

A. I gave him a number of short toots.

Q. What does a number of short toots mean in railroad service?

A. That is kind of an emergency whistle.

Q. An alarm whistle?

[fol. 82] A. Yes; an alarm whistle.

Q. Within what distance did you stop after the hand car or speeder, if you know?

A. I could not say, I do not know.

Q. Is there any way to stop a locomotive quicker than by the use of the emergency brake?

A. No, sir.

Q. Did you apply your sand?

A. Yes.

Q. Tell the jury what you do, how you do that?

A. I turn on the sand, a little valve.

Q. Where does that sand go?

A. Down on the rail.

Q. What effect does that have upon the movement of the engine?

A. It helps stop the train.

Q. Where does it go on the wheel?

A. It goes right on the rail and in between the brake shoes, the wheel goes over it, and up against the brake shoes, in the brake shoes on the wheel.

Q. The sand goes in front of the first drive wheel?

A. Yes, the sand goes in front of the first drive wheel.

Q. I presume this engine has what is known as pony trucks?

A. Yes.

Q. How many wheels are contained in those pony trucks?

A. Four wheels, two each side.

Q. Then comes the drive wheels?

A. Yes, the drivers.

[fol. 83] Q. How many drivers do you have?

A. Three on each side.

Q. Then you have wheels for the tender?

A. Yes; there are wheels for the tender.

Q. The emergency lever and whistle cord were all within your reach?

A. Yes.

Q. So all you have to do is to sit there and reach and pull it?

A. Yes.

Q. Without moving from your seat at all?

A. I did not have to move from my seat at all.

Redirect examination.

Mr. Stassen:

Q. When did you release the sand?

A. When I saw it was a speeder.

Q. Immediately upon seeing it was a speeder?

A. Yes.

Q. What did you do first, blow the whistle or apply the brakes?

A. I blew the whistle and applied the brakes at about the same time.

Q. And did you keep the brakes on emergency?

A. Yes.

Q. Until you came to a stop?

A. Until I came to a stop.

Q. You say you had four cars on that train?

A. Yes; there were four cars on the train.

Q. What did that consist of, do you know?

A. A mail and baggage car, two coaches, I think, one combination sleeper and diner, and coach, I could not say [fol. 84] about the rear, I know the head end had a baggage and mail car.

Q. Do you know the number of the locomotive you used that night?

A. Yes.

Q. What was it?

A. It was 5-4.

Q. Fifty-four.

A. Five Hundred Four.

Q. Have you ever brought this same locomotive to a stop at this same point since the accident?

A. At that point?

Q. Yes?

A. Yes.

Q. When was that?

A. That was sometime ago.

Q. But it was since the accident happened?

A. Yes.

Q. Do you know where you stopped the locomotive on that occasion?

A. No.

Q. You do not?

A. No, sir.

Q. You know just where you stopped the locomotive the night of the accident?

A. I could not exactly say, down near the curve.

Q. Down near the south end of the curve?

A. Down near the south end of the curve.

Q. That is the end of the straight-of-way?

A. West end of the curve.

Q. Your train is running sort of southwest there, from Hampton to Randolph?

[fol. 85] A. Yes, and curve turns to the left down there.

Q. Do you know where you applied the brakes this time you stopped since the accident happened?

A. I could not say.

Q. What were the circumstances under which you stopped your locomotive this time since the accident?

A. They made a test.

Q. But you state you do not know just where you applied the brake, or where you stopped?

A. I could not tell, they had a party there.

Q. They had a man there on the tracks?

A. Yes.

Q. Now this time since the accident, how was it determined where you should put on your brakes?

A. What?

Q. How did you know where to put on your brakes this time since the accident?

A. They had a party there, and when I go to that party I used the brakes on emergency?

A. *Yes.*

Q. The party was standing there, and when you got to him you turned on the emergency?

A. Yes.

Q. Did you do that once or more than once—stop the train?

A. Once, I think, or twice, I forget now.

Q. You do not remember whether it was once or twice?

A. No.

[fol. 86] Recross-examination.

Mr. Stearns:

Q. Mr. Gramling, this time you made the test after the accident, that was at the request of the claim department, was it not?

A. I think so, I could not say who, I think it was at the request of the claim department.

Q. Who was with you at the time?

A. The traveling engineer.

Q. What was his name?
A. Rowe.
A. Who else?
A. The Westinghouse Airbrake man.
Q. The Airbrake man?
A. Yes.
Q. Was your brake and engine in substantially the same condition at the time this test was made as at the time of the Rambo accident?
A. I could not say, I think so.
Q. You say a man stood there and told you where to apply your brakes, where was this particular place that this man stood?
A. He stood near the right-of-way, outside the right-of-way.
Q. Do you know where Rambo was hit?
A. Not exactly, I did not go back to see.
Q. You did not get off your engine to go and see?
A. I did not go back, I just went back to the baggage car, and then went back up again.
Q. And when these tests were made, did you apply your brakes in the same manner as you did at the time Rambo was killed?
[fol. 87] A. Yes, I did.
Q. This train goes from Minneapolis where?
A. Oelwein, Iowa.
Q. Through Minnesota to Oelwein, Iowa?
A. Yes, through Minnesota to Oelwein, Iowa.
Q. What is known as the interstate commerce train?
A. Yes.

PETER ENGLIN, being called as a witness on behalf of the plaintiff, was first duly sworn, and testified on direct examination as follows:

Examined by Mr. Stassen:

Q. What is your name?
A. Peter Englin.
Q. How old are you?
A. I am sixty-nine years old.
Q. You are a train conducter for the Chicago Great Western Railroad Company?
A. Yes.

Q. And have been for many years?
A. Yes.
Q. You were a conductor on No. 8 the night in question?
A. Yes.
Q. And you were in charge of the operation of that train at the time of that first accident at Rich Valley?
A. Yes.
Q. And as has been testified, you lost the pilot in that accident?
[fol. 88] A. Yes.
Q. Did you secure any train orders at Rich Valley?
A. No.
Q. Did you talk to anyone on the telephone?
A. Yes, I talked with the dispatcher and superintendent.
Q. What are their names?
A. I do not remember who the dispatcher was.
Q. Who was the superintendent?
A. Superintendent Fowler.
Q. I will ask you whether or not you advised the superintendent as to the pilot having been broken off?
A. Yes.
Q. What did he tell you to do?
A. He told me to go ahead.
Q. He told you to go ahead?
A. Yes.
Q. And you did go ahead down the line?
A. Yes.
Q. Without a pilot?
A. Yes.
Q. Did you take on any train orders at either Empire or Hampton that night?
A. No, sir.
Q. Is Hampton, as the engineer testified, equipped with this board and hoops to give you signals on the fly?
A. Yes.
Q. Have you at various times taken orders on the fly at Hampton?
[fol. 89] A. Yes.
Q. In your years of your experience I suppose many times?
A. Yes.
Q. What did you first observe with reference to the Rambo accident?

A. When he set his air in emergency?
Q. Where were you at that time?
A. I was in the smoker.
Q. You were in the smoker?
A. Yes.
Q. That would be in the coach?
A. Yes; in the coach.
Q. Immediately behind the mail and baggage car?
A. Yes; three cars from the engine.
Q. Did you observe anything else at the time of the Rambo accident?
A. Yes, I seen a flash of fire shortly after he applied his brakes.
Q. Where did you see that?
A. It went by the window where I was sitting?
Q. You say it went by the window where you were sitting in this third car from the engine?
A. Yes.
Q. Can you tell how soon after you heard the brakes applied this flash of light went passed your window?
A. I know it was not very long, but I could not tell you just exactly how long it was.
Q. And then your train was brought to a stop?
[fol. 90] A. Yes.
Q. Then what did you do?
A. I went out to see what was wrong, I went down to the engine.
Q. You went up to the head of the engine?
A. Yes.
Q. Did you travel through the train or on the ground?
A. On the ground.
Q. Did you talk to the engineer?
A. Yes.
Q. What did he say?
A. He said he thought he hit the signal maintainer.
Q. Did he say anything else?
A. Why, we talked, I do not remember just what he did say, we talked about the accident.
Q. Did he say anything as to whether or not the maintainer was on the car when he hit him?
A. Yes; he said the last he seen of him he was on the car.
Q. What did you do then, Mr. Englin?

A. I walked back to where we hit him, back up the track.

Q. What did you find?

A. Well, I did not find much of anything, I found some pieces.

Q. Pieces of what?

A. Flesh and some clothing.

Q. Where were these?

A. Oh, they were strung along the track there for quite a ways.

[fol. 91] Q. What is that?

A. O, they were strung along the track there for quite a ways.

Q. Was there any fire burning on the track at that time?

A. Yes.

Q. Where was that fire burning?

A. Oh, that must have been about ten to twelve car lengths back from our train, from where we stopped.

Q. Back behind the train?

A. Yes.

Q. The fire was burning there on the tracks?

A. There was a piece of sheepskin coat burning.

Q. You say there was a piece of sheepskin coat burning?

A. Yes.

Q. What else did you find along the track?

A. That is all, and I found a piece of speeder, the gasoline car.

Q. What kind of a piece was that?

A. Oh, it was a small piece of wood, and then there was one iron lever like a reverse lever, like a shift lever of a car.

Q. Where was that?

A. That was in the middle of the track, stuck in a tie.

Q. You say that was in the middle of the track, stuck in a tie?

A. Yes.

Q. Along the track?

A. Yes.

[fol. 92] Q. You did not measure the distance back to where the crash had occurred?

A. I did not.

Cross-examination.

Mr. Stearns:

Q. About how fast was your train going when the accident happened to Rambo?

A. I should judge between fifty-five and sixty miles an hour.

Q. How many trains were in the train?

A. There were four cars in the train.

Q. You do not know the weight of the locomotive, do you?

A. No, I do not.

Q. Did you hear the whistle blown?

A. No, I do not believe I did, I do not remember, I was pretty busy making out reports of the accident at Rich Valley at that time.

Q. You were not paying any attention to it?

A. No, sir, I was not paying any attention.

Q. And you were where your duties required you to be?

A. Yes, sir, I was in the smoker where I have my office.

Q. Do you know where Mr. Rambo was hit?

A. Yes, that is the location by the track, is that what you mean?

Q. Yes?

A. Yes, I know, I could not describe it, but I know just where it was.

Q. At the time the test was made to see within what dis-
[fol. 93] tance the engine could stop, were you present?

A. No.

Q. Was there any place between Rich Valley or Empire where you could obtain a new pilot?

A. No, sir.

Q. You say you received no train orders at Rich Valley?

A. No.

Q. Where was this train going to?

A. Oelwein, Iowa.

Q. Do you know within what distance the emergency brake was applied prior to the accident, Mr. Englin?

A. No, it is pretty hard for me to tell, it was dark then, and I was inside the coach, I could not tell you just how far it was.

Q. It was dark at the time of the accident?

A. Yes.

Q. Was this train carrying United States mail?
A. Yes, sir.

Mr. Stearns: That is all.

Redirect examination.

Mr. Stassen:

Q. How long did you stop at Rich Valley?
A. About forty minutes.
Q. Do you know how many miles it is from St. Paul to Rich Valley?
A. Sixteen miles.
Q. And under your schedule what time do you leave St. Paul?
[fol. 94] A. 3:30.
Q. And what time are you scheduled to go through Rich Valley?
A. I would not say for sure, I do not try to memorize that, I do not want to get mixed up so I look at my time table.
Q. Have you a time table here?
A. I have not.
Q. Do you know how many minutes Rich Valley is out of St. Paul?
A. No, if I did I could tell you what time it was due there.
Q. And on the regular run you stop at South St. Paul?
A. No.
Q. The orders you take at South St. Paul, you take on the fly?
A. Yes, they hand them up on the hoop.
Q. The same system as they use at Hampton?
A. At all stations where we are not scheduled to stop.
Q. At all stations where you are not scheduled to make a regular stop?
A. Yes.

Mr. Stassen: That is all.
Mr. Stearns: That is all.

NICHOLAS SCHAACK, being called as a witness on behalf of the plaintiff, was first duly sworn, and testified on direct examination as follows:

Examined by Mr. Stassen:

[fol. 95] Q. What is your name?

A. Nicholas Schaack.

Q. How do you spell your first name?

A. Nicholas.

Q. How do you spell your last name?

A. Schaack.

Q. How old are you?

A. Fifteen.

Q. You understand that you just took an oath to tell the truth?

A. Yes.

Q. And nothing but the truth?

A. Yes.

Q. Will you do that?

A. Yes, I will.

Q. Where do you live?

A. Three and a half miles south of Hampton.

Q. Where with relation to the Great Western railroad track?

A. On the west side of the Great Western railroad track.

Q. Does your farm adjoin the railroad track?

A. Yes.

Q. Is part of your farm on the other side of the railroad track?

A. Yes.

Q. By "your farm" I mean your father's farm.

A. Yes, I know.

Q. The farm you are working on?

A. Yes.

Q. Do you remember the night of December 8?

A. Yes.

[fol. 96] Q. And you remember a certain accident happening that night near your home?

A. Yes.

Q. At the time this accident happened, where were you, Nicholas?

A. I was on the south side of the yard.

Q. You were on the south side of your yard?

A. Yes.

Q. How long had you been out in the yard?
A. I cannot recall that.
Q. What were you doing?
A. I was catching chickens.
Q. Had you been out there for some period of time prior to the accident?
A. Yes.
Q. And this railroad track, as you testified, is east of your house and yard?
A. Yes.
Q. What did you first notice the night of the accident?
A. What?
Q. What did you first notice the night of the accident in relation to the Great Western railroad tracks?
A. I heard a train coming.
Q. What did you next notice?
A. I noticed the train.
Q. You will have to speak louder.
A. I noticed the train.
Q. Then what did you see?
A. I saw it coming down the track.
Q. What did you notice then?
[fol. 97] A. Then I heard the speeder.
Q. You heard a speeder?
A. Yes.

The Court: Talk louder so that the attorneys will not have to repeat your answer. You can talk louder, can you not?

A. Yes, sir.
Q. This speeder was on the same railroad track?
A. Yes.
Q. There was only a single track there passed your place?
A. Yes.
Q. Where was the speeder when you heard it?
A. I do not know.
Q. You do not know?
A. No.
Q. What did you next see or hear?
A. Well, I saw the speeder later on.
Q. You saw the speeder later on?
A. Yes.

Q. How did you see it?
A. I saw it in front of the train going down the track.
Q. What?
A. I saw it in front of the train going down the track.
Q. By what light did you see it, actual light or light of the train?
A. Light of the train.
Q. About where, have you any land marks or any object there that you can place the location of that speeder at that time when you saw it?
[fol. 98] A. It was even with the first telephone pole from the place where they hit it.
Q. You say it was even with the first telephone pole from the place where they hit it?
A. Yes.
Q. And then just tell us what happened, what you saw?
A. When the train came closer, he whistled.
Q. How close was the train when the whistle blew?
A. I do not know, I cannot remember that.
Q. What else did you see?
A. When he got still closer I saw fire from the brakes.
Q. When he got still closer you saw fire from the brakes?
A. Yes.
Q. How close was the train at that time?
A. About one rod away from where they hit him.
Q. You say about one rod away from where they hit him?
A. Yes.
Q. How far is a rod?
A. Sixteen and a half feet.
Q. Then what did you see?
A. Then I saw a flash of fire.

Plaintiff's Exhibits C, D, E, and F marked for the purpose of identification.

Q. Handing you Plaintiff's Exhibit C, I will ask you what that is?
A. That was taken from where I stood to where they killed him.
[fol. 99] Q. That is a picture?
A. Yes.
Q. You were present when that was taken?
A. Yes.

Q. And the boy on the railroad track there is yourself?
A. Yes.
Q. You say that is a view taken from where you stood?
A. Yes.
Q. To where they hit the speeder?
A. Yes.
Q. And when was that taken?
A. That was taken about a week ago.

Mr. Stearns: Which side of the picture was he standing on?

Mr. Stassen: He was right on the track.

Mr. Stearns: Which way was the picture taken, this way (indicating)?

Mr. Stassen: Yes.

Mr. Stearns: May I ask a question?

Mr. Stassen: Surely.

Examination.

Mr. Stearns:

Q. You say this picture of the boy represents the place where Rambo was killed?
A. Yes.
Q. Where were you standing?
A. Right here.
Q. You mean in the middle of the picture?
A. Yes.
[fol. 100] Q. Was anything there to mark that place when the picture was taken?
A. Yes, cornstalks were there.
Q. The picture appears to be taken from the lefthand corner, you were standing in the middle of the picture or lefthand corner at the time you saw the accident?
A. I could not say.

Mr. Stearns: I have no objection.

The Court: Received.

Direct examination continued.

By Mr. Stassen:

Q. I will ask you whether or not it is true, Nicholas, that the camera was standing where you were standing that night when the accident happened?
A. Yes.

Q. You saw the camera put up there before you went upon the railroad track?

A. Yes.

Q. Calling your attention to Plaintiff's Exhibit C, the long embankment there, I will ask you whether or not that is the long embankment upon which the railroad tracks are laid?

A. Yes.

Q. So the railroad tracks form the horizon of the top view there?

A. Yes.

Q. And just about in the middle of the picture is a little object, a dog?

A. Yes.

[fol. 101] Q. That is yourself and dog?

A. Yes.

Q. You were standing there where you saw Rambo hit the night the accident happened?

A. Yes.

Q. Can you indicate upon this picture where the train was when you first saw the speeder ahead of it?

A. I was right here (indicating).

Q. About right there (indicating), will you make a mark with your pen at that place?

(Witness marked the Exhibit.)

Q. Then will you show where the speeder was when you first saw it in the light of the train?

(Witness marks Exhibit.)

Q. You made your mark right by the telephone post, next to this side of where you were standing in the picture?

A. Yes.

Q. Now, above the first mark showing where the train was I will place a circle with the figure (1) and above the second mark, being where the speeder was, I will put a circle and the figure (2). Now, you state, Nicholas, that after you saw the speeder in the light of the train you heard a whistle?

A. Yes.

Q. And after you heard the whistle, you saw sparks fly from the wheels of the train?

A. Yes.

Q. And at the time sparks flew from the wheels of the train it was about one rod from the speeder?

[fol. 102] A. Yes.

Q. Can you describe these sparks from the wheels, how did they look to you that night, did they fly out from the wheels and rails, where they came together?

A. Yes.

Q. Could you see the speeder at all by natural light?

A. No, sir.

Q. You say you heard it going by?

A. Yes.

Q. You could not see it?

A. No, sir.

Q. What direction was the speeder going in?

A. It was going in a southerly direction.

Q. The same direction the train was going?

A. Yes, the same direction the train was going.

Q. At the time you heard the speeder and heard the train, did you look away from the track up to the time of the accident?

A. Yes.

Q. Where did you look?

A. Towards the west.

Q. Towards the west?

A. Yes.

Q. What did you look towards the west for, what did you see there?

A. I looked towards the cornstalks to see if there was a chicken there.

Q. How long were you looking at the track and the train before the accident happened?

[fol. 103] A. I do not know.

Q. Were you looking at the track and train when the speeder first came into view?

A. When I looked back, then I saw it.

Q. What did you do after the accident?

A. I went down there.

Q. You went down to where the accident happened?

A. Yes.

Q. Did you go up the tracks?

A. Yes.

Q. What did you do down there?

A. I was looking around.

Q. What did you see?

A. I saw some slivers from the car.
Q. What else did you see?
A. And some fire burning.
Q. Fire burning along the track?
A. Yes.
Q. Could you find the speeder?
A. I saw pieces of it.
Q. Handing you Plaintiff's Exhibit D, what is that a picture of?
A. That is a picture of the straight stretch from the curve at the north.
Q. Starting from the curve is a northerly straight stretch down to the south?
A. Yes.
Q. And is the scene of the accident in the distance in this picture?
A. I cannot see it.
Q. But are you looking towards it as you look at that picture?
[fol. 104] A. Yes.

Mr. Stassen: Offer in evidence Plaintiff's Exhibit D.
Mr. Stearns: No objection.
The Court: Received.

Q. On the right of Plaintiff's Exihibit D you see some buildings?
A. Yes.
Q. What are those?
A. Those are our farm buildings.
Q. We will write Schaack above those buildings, and immediately in front of this picture is north, is it?
A. Yes.
Q. And the distance is south?
A. Yes.
Q. And you are looking down toward what town?
A. Randolph.
Q. Now at the time this picture was taken where were you?
A. Standing down there on the track.
Q. Can you see yourself?
A. Real faint.
Q. You say you can see yourself faintly in the distance between the tracks?
A. Yes.

Q. Where were you standing?
A. In the middle of the track where they hit the speeder.
Q. Handing you Plaintiff's Exhibit F, what is that a picture of?
[fol. 105] A. That is a picture of where the train was when I saw the speeder.
Q. That is a picture of where the train was when you saw the speeder?
A. Yes.
Q. You are standing on the track in this picture, too?
A. Yes.
Q. Where are you standing?
A. Where they hit the speeder.
Q. Where was the camera?
A. In the middle of the track.
Q. Where?
A. Where the train was.

Mr. Stassen: Offer in evidence Plaintiff's Exhibit F.
Mr. Stearns: I suppose subject to my examination of the witness, but I will wait until you finish your examination of the witness on all those pictures.

Mr. Stassen:

Q. Plaintiff's Exhibit E is what?
A. A picture from where they hit him.
Q. What direction?
A. North.
Q. That is looking back north from Exhibit F?
A. Yes.
Q. What was done with the camera after taking Plaintiff's Exhibit F?
A. It was turned around and they took the picture north.
[fol. 106] Q. The camera is turned around in the same location and the picture is taken back north?
A. Yes.

Mr. Stassen: We offer in evidence Plaintiff's Exhibit E.
The Court: Received.

Q. Now in these pictures, particularly Plaintiff's Exhibit C, there appears to be no obstruction to your view of the railroad track from where you were standing that night, on the actual night in question, December 8, was

there then any obstruction between you and the railroad track?

A. No, sir.

Q. No trees, buildings, wagons, or anything between you?

A. No.

Q. Where did the train come to a stop that night?

A. Quite a ways down from where they hit him.

Q. Was there anything along the track there where you could place the position?

A. Well, there was a mile post there, that was just around that.

Q. Around a mile post?

A. Yes.

Q. And in the picture in which you are close to the camera, is the mile post in the far distance on the left hand side of the track?

(No answer.)

Q. In Plaintiff's Exhibit F, can you show us where that mile post is?

A. It is right behind me there, you cannot see it in that picture.

[fol. 107] Q. It is right behind you?

A. Yes, only it is quite a ways down farther.

Q. Where is it in relation to the north?

A. It is north of the curve.

Q. How far?

A. I could not say just the distance.

Q. You say you could not say the distance?

A. I could not.

Q. Could you see the man upon the speeder?

A. Yes.

Q. Could you see which way he was facing?

A. No, sir.

Q. Why not?

A. I could not see him clear enough.

Q. Did you see any light on his speeder before the accident happened?

A. No, sir.

Q. You say that the first thing that attracted your attention to the train was the noise of the train?

A. Yes.

Q. Where was the train when you first noticed the lights of the train?

A. About by the underground crossing.

Q. You say about by the underground crossing?

A. Yes.

Q. And that underground crossing is what type of crossing, for automobiles?

A. Yes.

Q. The road that goes under there?

A. Yes.

Q. And where does that road run?

[fol. 108] A. East and west.

Q. Where with relation to your buildings?

A. On the north side.

Q. On the north side of your buildings?

A. Yes.

Q. So this road in Plaintiff's Exhibit E, can you point out the road?

A. It is that white line you see through there.

Q. The white line you see crossing underneath the railroad tracks?

A. Yes.

Q. At that point there is an underground crossing where cars go underneath?

A. Yes.

Q. You say at that point is where the train was when you first noticed the lights of the train?

A. Yes.

Q. You state before that you heard the noise?

A. Yes.

Q. Did the man move or not before the train hit him?

A. I could not say?

Q. And why can't you say?

A. Because I did not see him very plain.

Q. You say because you did not see him very plain?

A. No, I could not see him very plain.

Mr. Stassen: You may question.

Cross-examination.

Mr. Stearns:

Q. How long were you out in the yard before this train came by?

[fol. 109] A. I do not know.

Q. A half an hour or more?

A. Yes, it might have been.

Q. What is that?

A. It might have been.

Q. When you first saw the train, how far were you from it?

A. I could not say.

Q. What is your best judgment?

A. Oh, thirty rods or so.

Q. Did you see the train before you heard it, or did you hear it before you saw it?

A. I heard it before I saw it.

Q. Then you looked and saw the train?

A. Yes.

Q. Was its headlight burning?

A. Yes.

Q. How far was the motorcar from the train when you first saw the motorcar?

A. About three-fourths lengths of a telephone pole.

Q. I beg your pardon?

A. About three-fourths lengths of a telephone pole, in between telephone poles.

Q. How far would that be?

A. I do not know.

Q. I think you testified as to various distances here accurately. Now, can you not tell me about how far this speeder was from the engine when you first saw the speeder? I am not trying to pin you down to exact feet, but what is your best judgment as to distance?

[fol. 110] A. About a hundred feet or so.

Q. The speeder was going in the same direction?

A. Yes.

Q. And you saw the speeder by the headlight of the engine?

A. Yes.

Q. And you saw that there was a man on the speeder?

A. Yes.

Q. You saw him sitting down?

A. Yes.

Q. All this was seen from the glare of the engine's headlight?

A. Yes, sir.

Q. That headlight completely flooded the man and speeder with light?

A. It was not very plain.

Q. You saw it was a speeder?

A. Yes.

Q. How far were you from the speeder at that time?

A. About forty rods.

Q. And you say there is sixteen and a half feet to a rod?

A. Yes.

Q. Being forty rods from the speeder, you had no difficulty in seeing there was a man on the speeder, that is right, isn't it?

A. Yes.

Q. Was the speeder to your right or left as you were looking towards the track?

[fol. 111] A. Left.

Q. To the left?

A. Yes.

Q. In this photograph, Plaintiff's Exhibit C, which way was the speeder and engine going, towards the right or left of the picture?

A. Towards the left of the picture.

Q. Towards the left of the picture?

A. It would be down this way, (indicating).

Q. Well, if it were going this way (indicating), it would be toward the right of the picture?

A. Oh, yes.

Q. This is right and this is left, (indicating).

A. Yes.

Q. Which way were they going?

A. Downgrade.

Q. Right or left?

A. Right.

Q. In Plaintiff's Exhibit C, the speeder and locomotive were going to the right of the picture?

A. Yes.

Q. And coming from the left?

A. Yes.

Q. Now, does figure (2) and (3) on the photograph, Plaintiff's Exihibit C, represent one hundred feet?

Mr. Stassen: Those are figures (1) and (2).

Mr. Stearns:

Q. (1) and (2)?

A. Yes.

Q. That is your estimate of one hundred feet?

A. Yes.

[fol. 112] Q. And you first saw the train when it was one hundred feet from the speeder?

A. No, at the time I first saw the speeder I saw the train when it was on the underground crossing.

Q. Which photograph shows that?

A. The crossing, that last one.

Q. Does Plaintiff's Exhibit E show where the train was when you first saw it?

A. Yes, that is the line (indicating) even with the road.

Q. The white line?

A. This one here, (indicating).

Q. That is where the train was when you first saw it?

A. Yes.

Q. What were you doing at the time you first heard the train?

A. I was watching the chickens, I was going to catch them.

Q. You were trying to catch them to bring them into their coops?

A. Yes.

Q. Were they young chicks?

A. About half grown.

Q. I suppose they gave you a little tussle to finally catch them?

A. Yes.

Q. So you were very busy at the time?

A. Yes.

Q. You hear trains going by your home frequently, don't you?

A. Yes.

[fol. 113] Q. So you don't pay any attention to trains merely by hearing them?

A. Yes.

Q. You heard a train and you happened to look up and saw it?

A. Yes.

Q. The headlight was burning?

A. Yes.

Q. You did not at all times watch the train up to the time of the accident?

A. No, sir.

Q. You went on about your business catching chickens?

A. Yes.

Q. Then when did you first happen to look towards the track again, what attracted your attention so you looked towards the track again?

A. I heard the speeder.

Q. And you knew what it was?

A. I kind of recognized it.

Q. And you looked up and saw it on the track?

A. Yes.

Q. Then did you continue to watch the speeder and train?

A. Yes.

Q. Right up to the point of the accident?

A. Yes.

Q. While you were catching these chickens, the whistle may have blown more than once, without you paying any attention to it?

A. The whistle did blow more than once.

Q. And how far was the engine from the speeder when you first heard the whistle?

[fol. 114] A. I could not say just how far.

Q. What is your best judgment on that?

A. About fifty feet or so.

Q. You would not say that the engine's whistle did not blow before that time, would you?

A. No.

Q. It may have blown without your noticing it at all?

A. Yes.

Q. Did you after the accident make any measurements of where the train was when you first saw it, and where it stopped?

A. No, sir.

Q. You did not go up for that purpose?

A. No.

Q. The train did not back up after the accident?

A. No.

Q. So when you say the distance the train stopped in after the accident, you guessed that?

A. Yes.

Q. You have no way of knowing that distance?

A. No, sir.

Q. And on this photograph, Plaintiff's Exhibit C, where you have (1) and (2) marked, that is your best impression of where the locomotive and speeder were when you saw them?

A. Yes.

Q. They may have been farther apart or closer together?

A. Yes.

Q. Take photograph, Plaintiff's Exhibit F, what does that represent?

[fol. 115] A. That represents where the train was when I first saw the speeder.

Q. That is merely a guess on your part?

A. Yes.

Q. Take Plaintiff's Exhibit B, what does that represent?

A. That represents the long stretch of straight line, the straight stretch from the curve.

Q. So that merely was to show where your farm was?

A. Yes.

Q. It is a good looking farm. Now, after the accident you at no time, Nicholas, went out there to make any measurements?

A. No.

Q. And you gave the matter no attention until you were called into the courtroom?

A. No.

Q. So all these distances you have given are merely guesses on your part?

A. Yes.

Q. You cannot say how far that train went after the accident, can you?

A. No, sir.

Q. Nicholas, do you know what distance the track is straight from curve to curve?

A. No, sir.

Q. Have you any idea of it?

A. I might say about two miles, maybe more.

Redirect examination.

Mr. Stassen:

Q. Mr. Stearns just asked you whether your attention [fol. 116] was ever called to this matter of distances and so forth, did you talk to anybody about what you had seen shortly after the accident?

A. Well, there was someone came and questioned us.
Q. Somebody came and questioned you?
A. Yes.
Q. And who was it?
A. He told us that he was a claim agent for the Great Western Railroad Company.
Q. When was that?
A. That was the next morning.
Q. The next morning after the accident happened?
A. Yes, the next morning after the accident.
Q. Did you then go down to the yard where you were?
A. No, sir.
Q. Did you tell him where you were?
A. Yes.
Q. Did you talk about where the speeder was and where the train was, about the lights and all that sort of thing?
A. Yes, sir.
Q. Was anything put in writing?
A. Yes, sir.

Recross-examination.

Mr. Stearns:

Defendant's Exhibit 2, marked for the purpose of identification.

Q. Showing you Defendant's Exhibit 2, Nicholas, is that your signature?
[fol. 117] A. Yes, that is my signature.
Q. Will you please read that?

(A five minute intermission was taken at this time.)

Q. Nicholas, did you read that statement during recess?
A. Yes, sir.
Q. And you gave that statement to Mr. Rumple on the ninth day of December, 1933?
A. Yes.
Q. He came to your home and wanted to know all the facts?
A. Yes.
Q. And what is in this statement, you told him?
A. There is one thing wrong there.

Q. Show me what is wrong, Nicholas.

(No answer.)

Q. Did you read the statement over before you signed it?
A. Yes, sir.
Q. Why is it wrong, what is wrong?
A. I made a mistake in reading—it is all right.
Q. You say it is all right?
A. Yes, sir, it is all right.
Q. And is that statement there as you gave it to Mr. Rumple a correct statement?
A. Yes, sir.

Redirect examination.

Mr. Stassen:

Q. Who wrote this down, Nicholas?
[fol. 118] A. The fellow who questioned us.
Q. This claim agent?
A. Yes.

. . . . . .

Q. That is your signature there?
A. Yes.

Mr. Stassen: No objection.
The Court: Received.
Mr. Stearns: I ask for the privilege at this time of reading this statement to the jury, or when I open my case I could do it.
The Court: You may do it now if you want to.

(Mr. Stearns reads Defendant's Exhibit 2 to the jury.)

Donald Miller, being called as a witness on behalf of the plaintiff, was first duly sworn, and testified on direct examination as follows:

Examined by Mr. Stassen:

Q. What is your name?
A. Donald Miller.
Q. How old are you?
A. Twenty.

Q. Where do you live?
A. Near Randolph.
Q. Where with relation to the Great Western tracks?
A. West of the Chicago Great Western tracks.
Q. And does the back of your farm border the tracks?
A. No, it does not.
[fol. 119] Q. How far does the back of your farm come from the tracks?
A. At the nearest point it is possibly seven, eight or nine rods.
Q. You say at the nearest point it is possibly seven, eight or nine rods?
A. Yes.
Q. And where do you live in relation to the Schaack home?
A. Southwest.
Q. Your home is southwest of the Schaack home?
A. Yes.
Q. Where were you on the night of December 8 when the accident happened?
A. East of the buildings.
Q. What were you doing?
A. I was husking corn.
Q. About how far were you from where the accident happened?
A. Three quarters of a mile, about.
Q. What did you first notice in connection with the accident?
A. I heard the whistle of the train.
Q. Then what did you notice?
A. I noticed a flash of light.
Q. And then what did you notice?
A. The train began to stop.
Q. You say the train began to stop?
A. Yes.
Q. Had you seen the train before you heard the whistle?
[fol. 120] A. Yes.
Q. Did you go down to the tracks after the accident that night?
A. No, I did not.
Q. So you did not talk to anybody connected with the accident that night, the train crew or anything like that?
A. No, sir.

Q. Did you notice anything back of the train after the train stopped?

A. I noticed a fire.

Q. A fire, you say?

A. Yes, sir.

Q. Did you see or hear anything of the speeder?

A. No, I did not.

Q. Did you go down to the tracks the next day?

A. Yes, sir.

Q. What time?

A. I imagine it was a little after ten o'clock.

Q. In the morning?

A. Yes, in the morning.

Q. What did you see?

A. I saw the section crew down there, and they had picked up parts of the speeder and parts of the body that had been found that morning.

Q. What shape was the speeder in?

A. It was very badly damaged.

Q. Was it in pieces?

A. It was in pieces.

Q. Give a further description of what happened to the speeder?

[fol. 121] A. Well, as I remember it, the four wheels were all there, but I think at least three of them had the hubs knocked out, and they had some of the hubs there, and they had a few other parts, I think they had a part of a cylinder there.

Q. Part of a cylinder, you say?

A. Or part of a cylinder head, I could not say.

Q. You say the section crew was there at that time?

A. Yes.

Cross-examination.

Mr. Stearns:

Q. Did you see the speeder at all before the accident?

A. No, I did not.

Mr. Stearns: No further questions.

JOHN REITER, being called as a witness on behalf of the plaintiff, was first duly sworn, and testified on direct examination as follows:

Examined by Mr. Stassen:

Q. What is your name?
A. John Reiter.
Q. You live at Randolph, Minnesota?
A. Yes.
Q. You are employed by the Chicago Great Western Railroad Company?
A. Yes.
Q. You are foreman of the section crew that works out of Randolph?
[fol. 122] A. Yes.
Q. And you were so employed last December 8?
A. Yes.
Q. Do you remember the night Mr. Rambo was killed?
A. Yes.
Q. Were you called out that night?
A. Yes.
Q. Where did you go?
A. I went out to the place he got killed.
Q. What did you find when you got out there?
A. Just pieces of the body and the motor car, and so on.
Q. Was the train still there?
A. No.
Q. Do you know where the train came to a stop that night?
A. Yes.

Mr. Stearns: What night are you talking about?
Mr. Stassen: December 8, the night of the accident.

Mr. Stearns:

Q. Were you there at the time the accident happened?
A. No, sir, I was not there at the time of the accident.

Mr. Stassen:

Q. Do you know where the train stopped that night?
A. Well, I know where they left sand on the rail, and where parts of the motor car were taken off the engine.
[fol. 123] Q. Where parts of the motor car were taken off the engine?
A. Yes, sir.

Q. And do you know where the motor car was first struck by the train?

A. Well, just about.

Q. How could you tell that?

A. Well, that is about where the pieces started and parts of the motor car were on the track.

Q. And had there been any fire on the track?

A. Well, yes, there was dark pieces where it seemed like it had been burning.

Q. Do you know how far the distance was from the last pieces to the first pieces?

A. It was twenty-three hundred some odd feet.

Q. You say it was twenty-three hundred some odd feet?

A. Yes, twenty-three hundred some odd feet.

Q. Did you identify the remains as being those of R. C. Rambo?

A. Yes, sir.

Q. How did you do that?

A. Well, I had quite a hard time doing it, but by the motor car.

Mr. Stearns: That is not competent, we admit that R. C. Rambo was killed in this accident.

Mr. Stassen: You admit that?

Mr. Stearns: Oh, yes, we have admitted it from the start?

Mr. Stassen:

Q. And you state that over this distance of two thousand three hundred and forty feet, or twenty-three hundred and [fol. 124] some odd feet, you found pieces of motor car and pieces of remains?

A. Yes.

Q. And scattered along the track and right-of-way?

A. Yes.

Q. Do you know the length of a railroad car?

A. Not exactly.

Q. Approximately?

A. About eight feet.

Q. About what?

A. About eight feet.

Q. Eighty feet?

A. Eight feet, a motor car you mean?

Q. No, I mean a regular railroad car, a regular car?

A. Around forty, of course, it is——

Q. I mean the cars pulled by train?
A. Yes.

Mr. Stassen: If you have it exact——
Mr. Stearns: Go ahead, this is your witness.

Mr. Stassen:

Q. And you say you were called out there the night of this accident?
A. Yes.
Q. Did you also go back the next day?
A. Yes.
Q. About how long a distance is the straight-of-way there from curve to curve?
A. A little better than a mile and a quarter, close to a mile and a half.
Q. And about how far from the upper end of this [fol. 125] straight-of-way is the point where the speeder was apparently hit?
A. How do you mean?
Q. How far from the north end of the straight-of-way is the point where the speeder was hit?
A. It is a good half mile.

Cross-examination.

Mr. Stearns:

Q. You said the length of passenger cars was forty feet, did you ever measure one?
A. No, sir, I did not.
Q. Did you ever get any information as to the length of a car?
A. Box cars run around forty feet.
Q. This is a passenger car?
A. They are longer.
Q. But you do not know how long?
A. No, sir.

Redirect examination.

Mr. Stassen:

Q. Do you know about how much longer a passenger car is?
A. Around ten feet or so, or more.

Q. Ten feet longer than a box car?
A. Yes, sir.

RAY HOLZEMER, being called as a witness on behalf of the plaintiff, was first duly sworn, and testified on direct examination as follows:

[fol. 126] Examined by Mr. Stassen:

Q. What is your name?
A. Ray Holzemer.
Q. How old are you?
A. Twenty-three.
Q. Where do you live?
A. Hampton.
Q. You work there in a hotel?
A. Yes, sir.
Q. Near the depot?
A. Yes, sir.
Q. Were you working there last December 8?
A. I was.
Q. Did you know Roy Rambo before he was killed?
A. I did.
Q. Did you see him on December 8?
A. I did.
Q. About what time?
A. About four o'clock.
Q. Where did you see him?
A. He come in the hotel there.
Q. What did he do there?
A. He come in there after a sandwich.
Q. And did he have a sandwich?
A. Yes, sir, he had a hamburger sandwich.
Q. How long did he stay there?
A. About fifteen or twenty minutes.
Q. And was your attention called to this particular day, and this particular event very shortly after it happened?
A. Yes, sir, I heard about the accident that night, and I [fol. 127] happened to think about it at that time that he was in there that day.

Cross-examination.

Mr. Stearns:

Q. You say he had a sandwich?
A. Yes, he had a sandwich.

Q. Did he have a glass of beer with his sandwich?
A. He did.
Q. Did he have more than one glass of beer?
A. No, sir, he had just one short glass of beer.

Court adjourned at this time until ten o'clock A. M. May 24, 1934.

May 24, 1934.

Ten o'clock session, pursuant to adjournment. All parties present.

HOWARD LATIMER, being called as a witness on behalf of the plaintiff, was first duly sworn, and testified on direct examination as follows:

Examined by Mr. Stassen:

Q. What is your name?
A. Howard Latimer.
Q. You are station agent at Hampton for the Chicago Great Western Railroad Company?
A. Yes, sir.
Q. How long have you been such?
A. Thirteen years.
[fol. 128] Q. How long have you worked for the Great Western?
A. Seventeen years.
Q. All that time as station agent?
A. Most of that time.
Q. Did you know Roy Rambo?
A. Yes.
Q. For how long a time?
A. Since 1920.
Q. Is your station at Hampton upon that section of track that he had as a signal maintainer?
A. Yes.
Q. He had that, I believe, for the past six years or so?
A. Yes.
Q. Did you know him prior to that?
A. Yes.
Q. Where?
A. At Boyd, Iowa.
Q. What was he doing at Boyd then?

A. He was a maintainer at that time.
Q. He was a signal maintainer then?
A. Yes.
Q. And you were located at Boyd?
A. Yes.
Q. Your station then was upon his territory in Iowa?
A. Yes.
Q. Do you recall December 8, 1933?
A. Yes.
Q. Did you see Roy Rambo on that day?
A. Yes.
[fol. 129] Q. Where did you first see him?
A. At the depot.
Q. When did you first see him?
A. It was about 9:30 in the morning.
Q. How long was he at the depot that morning?
A. About twenty minutes.
Q. And where did he go?
A. He went north.
Q. North on the tracks, that would be toward Empire?
A. Yes, towards Empire.
Q. Did you see Rambo again that day?
A. Yes.
Q. When?
A. At approximately 4:55.
Q. 4:55 in the afternoon.
A. P. M.
Q. Where did you see him then?
A. Right in front of the depot.
Q. In front of the depot at Hampton?
A. In front of the depot at Hampton?
Q. The Great Western depot?
A. Yes.
Q. In the morning did you talk to him?
A. Yes.
Q. What appeared to be his appearance and health?
A. Good.
Q. Did he or not appear to be in a pleasant frame of mind?
A. Yes.
[fol. 130] Q. You must explain that one way or another, explain what took place?
A. He was just the same as always.

Q. How was that?

A. Jolly.

Q. About how tall a man was he?

A. Rambo was about five feet tall.

Q. And what was his physical condition and nature, as you observed it?

A. Well, he was always quite a talkative fellow.

Q. Would you say that he was slow, spry, or how would you characterize him?

A. I would say he was a spry fellow.

Q. You stated that about 4:55 you saw him in front of the depot?

A. Yes.

Q. What was he doing then?

A. He was trying to get his motor car going.

Q. In which direction was his motor car facing?

A. Going south.

Q. When you saw him, was he standing still or moving?

A. He was standing still.

Q. And what was he actually doing while he stood there?

A. He was tinkering with his motor.

Q. And how far was this from where you were?

A. About twenty feet.

Q. And was the motor car on the track?

A. Yes, sir.

[fol. 131] Q. In front of the depot?

A. Yes.

Q. And where were you?

A. Inside of the depot.

Q. Inside?

A. Yes, inside of the depot.

Q. Can you describe how this particular part of the depot where you are located is situated?

A. Yes, it is the part of the depot that is built out, it is the office where you can look in both directions for trains, and in order to get out of the depot I have to go to the rear end from where I was and around.

Q. You say there are windows there where you can look in both directions?

A. Yes.

Q. And it protrudes further towards the track than the rest of the station?

A. Yes.

Q. Then what happened after you saw him outside tinkering with his motor?

A. I saw that he did not intend to come inside, so I ran out after him, but he was gone before I got there.

Q. Which way had he gone?

A. South.

Q. Did you see him going down the track to the south?

A. Yes.

Q. Then what did you do?

A. Nothing.

Q. Pardon me?

[fol. 132] A. I did not do anything.

Q. Did you go back inside the depot?

A. Yes.

Q. What time is No. 8 due through Hampton?

A. 4:12.

Q. Twelve minutes after four?

A. Yes.

Q. Had No. 8 gone through at the time you saw Rambo out in front?

A. No, sir.

Q. Did you know at that time that No. 8 had not gone through?

A. Yes.

Q. What equipment do you have in this station, with particular reference to communications along this line?

A. Telegraph instruments and telephone.

Q. With whom are you in communication on that system?

A. The dispatcher.

Q. The dispatcher located in St. Paul?

A. St. Paul.

Q. Did you use this system after you saw Rambo going down the track?

A. I do not know what you mean.

Q. Were you in communication with the dispatcher after Rambo left the depot?

Mr. Stearns:

Q. He means, did you call the dispatcher?

A. I can get in communication with the dispatcher at any time.

Mr. Stassen:

[fol. 133] Q. Did you actually get in communication with him after Rambo left?

A. I do not think so.

Q. After Rambo left you did you find out where No. 8 was?

A. Shortly after, yes.

Q. Shortly after that?

A. Yes.

Q. What did you find out?

A. I found out that No. 8 was moving, and that it would be along very shortly.

Q. How did you find that out?

A. I heard the agent at Empire tell the dispatcher the train was by.

Q. On your device you can hear other stations along the line talking to the dispatcher too?

A. Yes.

Q. You say you heard the agent at Empire tell the dispatcher the train went by?

A. Yes.

Q. What time did you hear that?

A. Right around five o'clock.

Q. That would be within five minutes after Rambo left the depot?

A. Yes.

Q. What did you then do?

A. I did not do anything.

Q. You have a device there with which you could have at that time communicated with the dispatcher?

A. Yes.

Q. Prior to hearing Empire tell the dispatcher the train [fol. 134] was going by there, had you asked the dispatcher where the train was?

A. No.

Q. How fast was this speeder traveling when you saw it going down the track?

A. He was just starting, he was going, I suppose, the highest speed was maybe about ten miles an hour. When I saw him it was getting dark.

Q. Does this speeder make considerable noise or not?

A. It makes quite a bit of noise.

Q. What causes the noise?

A. The motor.
Q. It is a motor propelled speeder?
A. Yes.
Q. Did you know that Rambo lived at Randolph?
A. Yes.
Q. How far is Randolph from Hampton?
A. About six miles.
Q. What time did No. 8 come through Hampton that night?
A. Five five.
Q. That would be fifty-three minutes late?
A. From 4:12 to 5:05.
Q. It was ten minutes approximately after Rambo had left?
A. Yes.
Q. And approximately five minutes after you had heard that the train went through Empire?
A. Yes.
Q. You state that from the time that Rambo left your [fol. 135] depot until the train went by Hampton you did not communicate with the dispatcher?
A. I do not remember of asking for any information.
Q. Did you give the dispatcher any information between those times?
A. No, sir.
Q. How long does it take you to communicate a message to the dispatcher?
A. You can communicate with him instantly.
Q. What?
A. I can communicate with him at any time, all I have to do is talk on the phone and he is there.
Q. Can he talk right back to you?
A. Yes.
Q. Does it work practically like the ordinary telephone?
A. Well, the dispatcher sits there all the time, all you have to do is talk to him and he answers.
Q. It is like a telephone that is perpetually connected with the same party on the other end?
A. Yes.
Q. Have you a signal and order block at Hampton?
A. Yes.
Q. And did you have an order block on December 8?
A. Yes.

Q. And have you hoops to which you can attach orders?
A. Yes.
Q. You attach these orders to these hoops and hand them [fol. 136] to the trainmen as the train goes by in motion?
A. Yes.
Q. Did you see Rambo doing anything else on that day?
A. In the morning, yes.
Q. Where?
A. In the battery valve on the crossing bell.
Q. That is located near the depot at Hampton?
A. About one hundred and fifty feet.

Cross-examination.

Mr. Stearns:

Q. You say the depot faces the track?
A. Yes.
Q. On the depot is a partition that goes out on the side?
A. Yes.
Q. Have you a dispatcher's phone there?
A. Yes.
Q. Where is that dispatcher's phone?
A. Right in that part that comes out.
Q. When you first saw Rambo, you say he was directly in front of you on the track?
A. Well, he was in front of the depot.
Q. On which side of you was he?
A. What?
Q. On which side of you was he, to the north or south?
A. He would be to the south of me.
Q. And you noticed that he was not going to come in? [fol. 137] A. Yes.
Q. Did you have the line up at that time?
A. No, sir.
Q. How do you get the line up?
A. Ask the dispatcher for it.
Q. Had any information been furnished you as to No. 8 at that time?
A. I knew it was late.
Q. Did Rambo come into the depot at all?
A. No.
Q. When was the last time you saw him before you saw him on the track at 4:55?

A. Well, at 4:55 Rambo was on his car moving at that time.

Q. When was the last time that you saw him before that time?

A. In the morning.

Q. At what time?

A. That would be approximately about ten o'clock, or 9:55.

Q. Did he get a line up from you at that time?

A. No, sir.

Q. Did he at any time on December 8 get a line up from you?

A. No, sir.

Q. Now, when you first saw him on the track in front of the depot how long did he remain there to tell him about No. 8?

A. Well, I had to get up as I was not facing the track at that time, I had to get up to look and see who it was, and when I saw who it was, I started out, but in the meantime he got his car going and was gone.

[fol. 138] Q. You started out as soon as you recognized Roy Rambo?

A. As soon as I recognized Rambo I started out.

Q. What was your purpose in going out?

A. To tell him that this train had not left here yet.

Q. How far was the telephone that connects with the dispatcher from Mr. Rambo when you saw him out on the track?

A. Not over fifteen feet.

Q. Is there a door leading to the track from that side?

A. Yes.

Q. That is on the south side of your station?

A. That would be the east side of the station.

Q. Oh, that would be the east side of the station?

A. Yes.

Q. That would be south of you though?

A. That would be south of me, but the station faces east.

Q. So if Roy Rambo had desired to call the dispatcher, he would have to walk only fifteen feet from the point he was on, on the track, to telephone the dispatcher?

A. Yes.

Q. And your telephones are always connected?

A. Yes.

Q. So the moment you pick up the receiver you get your dispatcher?

A. Yes.

[fol. 139] Q. You say you had to walk back of the station and outside and around in front?

A. Yes.

Q. And which side of the station did you pass, the north or south side?

A. I went out the north side?

Q. Had he left when you got out near the track?

A. Yes.

Q. How far is Rambo's home from your station?

A. You mean Randolph?

Q. Yes, the station of Randolph?

A. About six miles.

Q. Do you know the speed of these speeders?

A. They usually travel about thirty miles an hour.

* * * * * * *

Q. Do the signal maintainers put their cars or speeders on the tracks and take them off themselves?

A. Yes.

Q. That is part of their work?

A. Yes.

Q. Have you a Y or cross bridge anywhere south of your station?

A. A switch, yes.

Q. Where is that?

A. About a half mile south.

Q. You know that switch is a place where Rambo could have taken his speeder off the main line track had he desired not to lift his speeder off the track?

[fol. 140] A. Yes.

Q. He——

Mr. Stassen: That is objected to as improper cross-examination, and calling for a conclusion of the witness.

The Court: Answer may stand. Objection overruled.

Q. Had you at other times seen him on that switch?

A. Many times.

Q. Had you at times seen him lift his motor car off the track and put it on?

A. Yes.

Q. Did you know where Rambo was going?
A. No.

Redirect examination.

Mr. Stassen:

Q. You say you saw Mr. Rambo out in front of your depot, and you started out to warn him?
A. Yes.
Q. You realized, didn't you, that if he started down the track he would be in a dangerous position?

* * * * * * *

A. I did not know where he was going.
Q. Well, you were practically certain that he was going to Randolph at that time of day, were you not?
A. Well, he may pull down to the switch and set off.
Q. In your own mind, at 4:55 on December 8, 1933, you [fol. 141] thought he was going to Randolph, didn't you?
A. I knew he was eventually going to Randolph.
Q. And you thought that day, at that time, he was going to Randolph?
A. Yes.
Q. And you thought in your own mind that if he did start for Randolph, and go down that track toward Randolph, he would be in a dangerous position, and that is the reason you started out to warn him?
A. Well, I thought he did not realize that the train had not went by, and I was just going to notify him that the train had not went.
Q. Had not gone?
A. Had not gone.
Q. And thinking he did not realize that, you also thought that if he went down the track, not realizing the train had not gone by, he would be in a dangerous position?
A. Yes.
Q. You thought that, didn't you?
A. Yes.
Q. And what is the fact as to whether or not it is unusual for No. 8 to be later going through Hampton?
A. They are usually on time.
Q. And about what percentage of the time are they on time, or within a very few minutes of being on time?

A. About ninety-five per cent of the time.

[fol. 142] Q. How often is No. 8 over fifty minutes late?

A. Probably in the last year not over two or three times.

Q. And No. 8 is a train that goes down every day?

A. Yes.

Recross-examination.

Mr. Stearns:

Q. In addition to regular trains that run on schedules, did extras go by your station?

A. Yes.

Q. And freight trains not scheduled?

A. Yes.

Q. And have you seen speeders of various employers go by there?

A. Yes.

Q. Showing you Plaintiff's Exhibit B, this has been testified to as a line up secured at noontime by Eckstrom and shown Rambo, do you recognize that as such?

Mr. Stassen: Objected to as no foundation laid, calling for a conclusion of the witness.

Q. What do you recognize that as?

A. That is the line up.

Q. How long are those line ups good for?

Mr. Stassen: Objected to as calling for a conclusion of the witness, the line up speaks for itself.

The Court: You may answer.

A. One hour only.

* * * * * * *

[fol. 143] Re-direct examination.

Mr. Stassen:

Q. When Roy Rambo came in the depot in the morning, I will ask you whether or not he showed you the morning line up out of Randolph?

A. Yes.

Q. And is that the regular morning line up?

A. Yes.

Q. What time does that go out?
A. 7:50.
Q. Who does it come from?
A. The dispatcher.
Q. This other line up in evidence, what is that?
A. That is the noon line up.
Q. The regular noon line up?
A. Yes.
Q. Who does that come from?
A. The dispatcher.
Q. Are there any other regular line ups during the day?
A. No, sir.

Recross-examination.

Mr. Stearns:

Q. This noon line up was prior to No. 8 leaving Minneapolis?
A. Yes.
Q. And is No. 8 included in that line up?
A. No, sir.

[fol. 144] Redirect examination.

Mr. Stassen:

Q. Are the passenger trains included in these regular line ups when on time?
A. They usually say, "passenger trains on time," or a certain train so many minutes late.
Q. But does No. 8 ordinarily appear specifically on any regular line up during the day?
A. No, sir.
Q. It does not?
A. No, sir.

Frank Vander Walker, being called as a witness on behalf of the plaintiff, was first duly sworn, and testified on direct examination as follows:

Examined by Mr. Stassen:

Q. What is your name?
A. Frank Vander Walker.

Q. Where do you live?

A. St. Paul.

Q. You are employed by the Chicago Great Western Railroad Company?

A. Yes.

Q. In what capacity?

A. Signal maintainer.

Q. Is that the same type of work that Roy Rambo was doing?

A. Yes.

Q. How long have you been so employed?

A. Since 1917, I believe, in the signal part of it.

[fol. 145] Q. What is your beat?

A. St. Paul to Inver Grove.

Q. You drive one of these speeders, ride on one in the performance of your work?

A. Yes.

Q. Did you know Roy Rambo?

A. Yes.

Q. Did he drive the same type of speeder?

A. Well, practically the same, yes. Ours is a little different in St. Paul, it is a two man car, but they are practically the same.

Q. Are you familiar with the one man type of car?

A. Yes.

Q. What is the ordinary speed of one of these speeders, one man type?

A. Twenty miles an hour.

Q. What is the fact as to noise when you are riding a speeder?

A. Well, there is more or less noise from the exhaust of the engine.

Q. When you are riding on a speeder that is running, can you hear an approaching train?

A. Well,——

* * * * * * *

A. Well, I suppose you might hear a train a short distance, I do not know whether I can answer that properly or not, you would probably hear a train a short distance away.

Q. How much noise does a speeder make?

A. Well, there is the exhaust of the engine, and of course we are running on steel rails.

[fol. 146] Q. How many cylinder engine is it?

A. One.

Q. How heavy is the car?

A. I believe about four hundred pounds.

Q. You say it has four steel wheels and runs upon steel rails?

A. Steel tires.

Q. And this one cylinder engine is propelled by gasoline?

A. Yes.

Q. Why- type of exhaust does it have?

A. Well, it is not muffled very much, it exhausts quite freely, there is not much of any muffler on the engine.

Q. I believe you said that you had been a maintenance man since 1917?

A. Yes.

Q. Was that always for the same railroad?

A. Yes.

Q. The Chicago Great Western Railroad.

A. Yes.

Q. And what different locations?

A. I worked as a helper at McIntyre, Iowa, for a short time, at Dodge Center for a few months, as a signal maintainer in Kenyon for nine years, and in St. Paul the rest of the time.

Q. Have you ridden a one man car, the type that Rambo used?

A. Yes.

Q. To what extent?

A. Well, up until I went to St. Paul, in fact after I was there we had that type of car.

[fol. 147] Q. About how many years?

A. I would say I used one of them for twelve years, the same type of car.

Q. You sit upon a seat somewhat to the right hand side of the speeder, do you?

A. Yes.

Q. A one man car?

A. Yes.

Q. Is there anything about the cars to prevent you from jumping off the car to the right?

A. Well, you have to throw your feet up over the deck.

Q. You have to throw your feet up over the deck?

A. Over the deck of the car.

Q. And when you do that, can you jump off and land to the right-hand side of the rail?

A. Yes.

Q. Have you ever been struck by a locomotive while riding upon a speeder?

Mr. Stearns: That is objected to as incompetent, irrelevant and immaterial.

The Court: You may answer.

A. Yes.

Q. When was that?

Mr. Stearns: Same objection.

The Court: Same ruling. Only bears upon the question of whether or not he could hear the locomotive approach while riding upon a speeder.

Mr. Stearns: If that is the purpose, I have no objection.

(Question read by reporter.)

[fol. 148] A. I think it was February, 1922, I would not be sure.

Q. Where was it?

A. Two miles north of Dodge Center, Minnesota.

Q. And were you aware of the approach of that locomotive before it hit you?

A. Well, I guess not or I would have gotten off.

Q. And was there another man riding with you at that time?

A. Yes.

Q. And as far as you know, was he aware of the approach of the locomotive that hit you?

Mr. Stearns: That is objected to as calling for a conclusion of the witness.

The Court: Sustained.

Q. Was this a passenger train or freight train?

A. Passenger train.

Q. What train was it?

A. No. 8.

Q. On the same run only further down the line?

A. Yes.

Q. Do you know whether or not the locomotive at that time had a pilot?

Mr. Stearns: Objected to as incompetent, irrelevant and immaterial.

The Court: Sustained.

Q. Can you describe how a pilot is constructed upon a locomotive?

Mr. Stearns: Objected to as incompetent, irrelevant and immaterial, no sufficient foundation laid.

[fol. 149] The Court: Sustained on the ground that it is immaterial. It could not be the proximate cause of the accident. The objection is sustained.

Mr. Stassen. (Not within hearing of the jury.) Plaintiff at this time offers to prove that when a locomotive has a pilot on it it will strike objects, including objects such as a speeder with man on it, traveling in the same direction as a train is traveling, and throw them to one side, and not kill them, and that it is a question of reasonable inference in this case whether if the light was proper and the locomotive started to slow down a distance of eight hundred feet, and a speeder was traveling at the rate of twenty miles an hour in the same direction, and a proper pilot was on the locomotive that the blow in striking Rambo would not have been sufficiently great, and would have thrown him to the side so he would not have been killed.

Mr. Stearns: Defendant objects to the offer to prove by the plaintiff on the ground that the same is incompetent, irrelevant and immaterial.

The Court: Sustained.

Mr. Stassen: We now further offer to show that this train that hit Vander Walker was a passenger train, going at full speed.

Mr. Stearns: Same objections.

The Court: Same ruling.

Mr. Stassen: You may inquire.

Mr. Stearns: I have no question.

Plaintiff's Exhibit G marked for the purpose of identification.

Mr. Stassen: Plaintiff offers in evidence Plaintiff's Ex-
[fol. 150] hibit G insofar as it sets forth Rule No. 29, on Page 27, as to light, and Rule 129 on Page 71, rule as to lights, for the use of the Court only.

Mr. Stearns: Objected to as incompetent, irrelevant, and immaterial, no sufficient foundation laid.

The Court: Received.

Mr. Stearns: Exception.

Mr. Stassen: Offer in evidence Plaintiff's Exhibit G with reference to Rule 141 on Page 74 as to pilot on locomotives, for the use of the Court only.

Mr. Stearns: Objected to as incompetent, irrelevant, and immaterial, no sufficient foundation laid.

The Court: Sustained.

Mr. Stassen: Subject to leave to present an Expectancy Table, we rest at this time.

Opening statement on behalf of the defendant made to the jury by Mr. Stearns.

W. C. Groth, being called as a witness on behalf of the defendant, was first duly sworn, and testified on direct examination as follows:

Examined by Mr. Stearns:

Q. What is your name?

A. W. C. Groth.

Q. Where do you live?

A. Chicago.

Q. What is your business?

A. Chief Engineer for the Chicago Great Western Railroad Company.

[fol. 151] Q. How long have you worked for the company in that capacity?

A. As Chief Engineer since January 1, 1933.

Q. And prior to that time where and by whom were you employed?

A. By the Chicago Great Western, as Division Engineer.

Q. In St. Paul?

A. In St. Paul.

Q. Did you know Roy C. Rambo?

A. Yes.

Q. Does he work under your supervision?

A. He did.

Q. He did at the time of his death and prior thereto?

A. Yes.

Defendant's Exhibit 3 marked for the purpose of identification.

Q. Showing you Defendant's Exhibit 3, I will ask you what that is?

A. That is the Chicago Great Western Railroad Company's Books of Rules?

Q. Of what date?

A. May 1, 1923.

Q. Was that Book of Rules in force and effect on December 8, 1933, and prior thereto?

A. Yes.

Q. Was that Book of Rules furnished various employees of the Chicago Great Western Railroad Company, such as signal maintainers and trackmen?

Mr. Stassen: That is objected to as immaterial.

[fol. 152] The Court: Overruled.

A. This book is furnished to all signal maintainers, bridge foremen, track foremen, in fact to anyone in the maintenance department who has anything to do whatever with the operation of trains or come in contract with the operation of trains.

Q. Was that Book of Rules furnished to Rambo prior to his death?

A. Yes, it was, it was furnished to him when the book was put out.

Q. Has that Book of Rules been changed or altered?

A. No, sir.

Q. Now, under the rules of the company, can you refer to any rule with reference to signal men obtaining line ups of trains?

Mr. Stassen: That is objected to as not the best evidence.

The Court: Overruled.

A. I had a book with a mark, this does not seem to be the one. The Rule Book has a classification on page 172 covering the rules governing signal maintainers.

Q. Has that Book of Rules a rule pertaining to lights on hand cars?

A. I think not, those were special rules.

Mr. Stassen: Just a minute.

Mr. Stearns: I am just asking whether he has such a rule.

A. No, I think not, except that——

Q. Does that Book of Rules cover the duties of signal maintainers?

[fol. 153] A. Yes.

Mr. Stearns: We offer in evidence Defendant's Exhibit 3.

The Court: Are you offering the entire book?

Mr. Stearns: I will offer the entire book in case counsel wants to refer to anything else in the book, and I will refer to them specifically.

Mr. Stassen: We object to the offer of the entire book as immaterial, no foundation laid.

The Court: Sustained. It is immaterial as far as the rest of the book goes.

Mr. Stearns: Yes, it is, I thought possibly he would want to refer to some of the rest of it.

Q. Just check through and find for me the rules that provide for duties of signal maintainers and also any rule regarding lights on hand cars, if you find such a rule?

A. On Page 172, 173 and 174, Rules 944 to 954, inclusive, cover the specific rules governing signal maintainers.

Mr. Stearns: We offer in evidence Rules 944 and 948 of Defendant's Exhibit 3.

Mr. Stassen: No objection to Rule 948, the materiality of Rule 944 does not appear.

The Court: Objected to as immaterial. Received.

Mr. Stearns: May I read these to the jury, Your Honor?

The Court: You may.

(Rules 944 and 948 read to the jury by Mr. Stearns.)

Mr. Stearns: It is stipulated between the parties that on [fol. 154] December 8, 1933, sunset was at 4:30 P. M. Sky conditions at 4 P. M.—broken clouds (sky over five tenths to nine tenths inclusive, covered by clouds) 4:50 P. M.—overcast (sky more than nine-tenths covered by clouds.) Overcast then continuous throughout the night.

Mr. Stassen: It is stipulated that is the government report.

Mr. Stearns:

Q. Have you some other sections that apply?

A. General rules pertaining to all employes in connection with the operation of trains, flagmen rules.

Q. Showing you Defendant's Exhibit 1, I will ask you what that is?

A. That is a set of instructions as put out in 1932 covering the operation of motor, hand, push, trailer and velocipede cars.

Q. And to whom was that set of rules sent, what employes?

A. All employes that had anything to do with the operation of any of these vehicles on the railroad track.

Q. Sent to signal maintainers?

A. Yes.

Q. And to Roy C. Rambo?

A. Yes.

Mr. Stearns: Offer in evidence Defendant's Exhibit 1, Rules 5 and 27.

Mr. Stassen: No objection to Rules 5 and 27.

(Mr. Stearns reads Rules 5 and 27 to jury.)

Defendant's Exhibit 4 marked for the purpose of identification.

[fol. 155] Q. Showing you Defendant's Exhibit 4, I will ask you what that is?

A. That is a circular letter issued to all section foremen, B. & B. Foremen, and signal maintainers, regarding a motor accident occurring in which the men operating motor cars were not carrying lanterns in accordance with their instructions.

Q. Is that a rule inaugurated by you?

Mr. Stassen: Objected to as leading, not the best evidence.

The Court: You may answer.

A. Yes, I inaugurated that rule quite a few years ago.

Q. Was that rule sent to signal maintainers in the employ of the company?

A. Yes.

Q. And was it sent to Roy C. Rambo?

A. Yes.

Mr. Stassen: May I inquire?

Mr. Stearns: You may.

Examination.

Mr. Stassen:

Q. As I understand it, this is just a letter?
A. A circular letter.
Q. This is not a rule?
A. There is a title on the bottom of it?
Q. "Circular No. 485", is that what you mean?
A. Yes.
Q. And copy to track supervisors?
A. Yes.
Q. This is not a rule of the Railroad Company, it is a letter that you sent out?
[fol. 156] A. That is not a rule, no, it is simply calling to their attention a violation of that rule.

Mr. Stassen: No objection.
The Court: Received.

(Defendant's Exhibit 4 read to the jury by Mr. Stearns.)

Mr. Stearns:

Q. You say that you were the supervisor of Rambo?
A. I was the division engineer.
Q. Who did Rambo directly work under?
A. The supervisor of signals.
Q. Who did the supervisor of signals directly work under?
A. Under me.

Defendant's Exhibit 5 marked for the purpose of identification.

Q. Showing you Defendant's Exhibit 5, I will ask you what that is?
A. That is a little pamphlet issued by the Executive Safety Committee of the Chicago Great Western Railroad Company, covering rules for the prevention of accidents and injury to employes.
Q. Do you know whether or not that was sent to signal maintainers?
A. It was sent to all employes.
Q. Including Rambo?
A. Yes.
Q. Is there anything in this on line ups?
A. No.

Mr. Stearns: I offer in evidence that portion of Exhibit 5 marked on Page 26.

[fol. 157] Mr. Stassen: May I inquire?

Mr. Stearns: You may.

Examination.

Mr. Stassen:

Q. Mr. Groth, you did not issue this rule?

A. No, sir, I did not, that is issued by the Executive Safety Committee.

Q. That is out of Chicago?

A. Yes.

Q. You do not know who actually got it and who did not?

A. There were so many sent to each division, and then we sent them out to the individual employes.

Q. You have no way of knowing whether Rambo got one of these books or not?

A. I do have a way of knowing whether one was sent to him.

Q. What is that?

A. We have a regular mailing list of all employes in our office that they are sent to.

Q. You say you come from your office and not Chicago?

A. They are mailed out to employes from our office.

Mr. Stassen: No objection.

The Court: Received.

(Mr. Stearns reads Exhibit 5, Page 26, to the jury.)

Court adjourned at this time until 1:30, May 24, 1934.

[fol. 158] May 24, 1934.

1:30 session, pursuant to adjournment. All parties present.

W. C. Groth, being recalled for further direct examination, testified as follows:

Examined by Mr. Stearns:

Q. In the Exhibits introduced in evidence this morning for the defendant, that you speak of as circular letters, were those instructions to your signal men and others?

Mr. Stassen: Objected to as not the best evidence, the Exhibits speak for themselves.

The Court: Sustained.

Q. You intend them as instructions?

Mr. Stassen: Object to that as immaterial.

The Court: Sustained.

Defendant's Exhibits 6, 7, and 8 marked for the purpose of identification.

Q. Showing you Defendant's Exhibits 6, 7 and 8 I will ask you what they are?

A. Defendant's Exhibit 6 covers the careful use and operation of motor cars, special mention being made of operating motor cars.

Q. State whether or not it is a letter of instructions?

A. It is.

Q. And to whom was it sent?

A. To the section foremen, bridge and building foremen, and signal maintainers.

Q. By whom was this letter gotten out?

[fol. 159] A. By myself.

Q. Was that letter sent to Rambo?

A. Yes.

Q. And to all persons named in the classification shown on top?

A. Yes.

Q. What is Defendant's Exhibit 7?

A. That is——

The Court: The same kind of a letter?

Mr. Stearns:

Q. Is it a letter of instructions?

A. It is a letter of instructions that pertains to the absolute requirements of——

The Court: Don't state what's in it.

Mr. Stearns:

Q. It is a letter of instructions?

A. Yes.

Q. By whom was it gotten out?

A. Myself.

Q. To whom was it sent?

A. Section Foremen, Bridge and Building Foremen, Signal Maintainers, and Extra Gang Foremen.

Q. Was it sent to R. C. Rambo?

A. It was.

The Court:

Q. Does the same thing apply to that as to Exhibit 7?

A. Yes, the same thing applies to Exhibit 8 as to Exhibit 7.

Mr. Stearns:

Q. Was Exhibit 8 sent to Rambo?

[fol. 160] A. Yes.

Mr. Stassen: May I inquire?

The Court: You may.

Examination.

Mr. Stassen:

Q. In the event in the difference between the rules in the Safety Book, which is Defendant's Exhibit 5, and the rules in the regular Railroad Book, or in one of these special circulars, which rule governs?

A. Well, you will not find any difference.

Q. You will not find any difference?

A. No, sir.

A. Well, these rules for the prevention of accident and injury gotten out in 1924, Defendant's Exhibit 5, are they regular rules of the railroad, or rules sent by a special committee?

A. They are rules made up by the Executive Safety Committee, consisting of general officers and superintendents of the railroad.

Q. Well, if a rule issued subsequent to this Book of Rules, in Defendant's Exhibit 5, has a different requirement——

A. You will not find any like that.

Q. Call your attention to Rule 12 of Defendant's Exhibit 1, and the rule on the last page of Defendant's Exhibit 6, you will note a difference, will you not?

A. Well, the only difference in the two rules is that in the newer rules of 1932 the permissible speed of motor cars, under certain conditions, was increased to five miles an hour.

[fol. 161] Q. So it became twenty miles an hour rather than fifteen?

A. Under certain conditions, this 1929 rules says "Motor cars should not be run at any time at a speed in excess of fifteen miles per hour."

Q. That is a copy of the old 1924 Safety Rule, which you were sending out?

A. I do not know whether it was or not, let me see—yes.

Q. In that situation, which governs?

A. This rule (indicating).

Q. Defendant's Exhibit 1?

A. This supersedes all previous instructions.

Q. Defendant's Exhibit 1?

A. Yes.

Q. Well, this was really sent out after that one, was it not?

A. No, that is 28 or 29, this is 31 or 32.

Q. Well, the old rule in the Standard Book as I recall it, was 1929, was it not?

A. I do not remember.

Mr. Stearns: There was no rule offered as to speed of motor cars, you objected to that being put in.

Mr. Stassen: You are offering it now?

Mr. Stearns: I am not offering it yet.

Mr. Stassen: I understood that you were now offering Exhibits 6, 7 and 8.

Mr. Stearns: Yes—is that the last one?

Mr. Stassen: Yes.

The Court: Is there any objection to Defendant's Exhibits 6, 7 and 8?

[fol. 162] Mr. Stassen: There is no objectilon to Defendant's Exhibits 6, 7 and 8, but there is objection to the sheet attached which is superfluous and has some notation on it.

Mr. Stearns: The cover you mean?

Mr. Stassen: Yes.

Mr. Stearns: That is merely to keep them together.

The Court: May be received.

Mr. Stearns: I will only read some portions to save time. (Portions of Exhibits 6, 7 and 8 read to the jury.)

Mr. Stassen: I would like to read the balance of those exhibits at this time.

Mr. Stearns: You may read the whole thing.

Mr. Stassen: That is what I would like to do.

(Mr. Stassen reads Defendant's Exhibits 6, 7 and 8 to the jury.)

Defendant's Exhibit 9 marked for the purpose of identification.

Examination continued by Mr. Stearns:

Q. Showing you, Mr. Groth, Defendant's Exhibit 9, I will ask you what that is?

A. That is what you call a track profile.

Q. What is meant by a track profile?

A. It shows the grade of the track, as well as the general grade conditions on the ground line taken at the time the track was built.

Q. You are Chief Engineer for the Chicago Great Western?

A. Yes, sir.

Q. Is that Exhibit from your permanent record in Chicago?

[fol. 163] A. Yes.

Q. Made up by your Engineers?

A. Yes.

Q. And kept us as a permanent record?

A. Yes.

Q. Does that show the grade between Hampton and Randolph?

A. Yes.

Q. And shortly before arriving at Hampton from the north?

A. Yes.

Q. Explain what that grade is?

A. From which point to which point?

Q. Along the straight point.

A. You mean in the vicinity where the accident happened?

Q. Yes.

A. At a point approximately 3,800 feet north of where?

Mr. Stassen: We object to the witness referring to the document unless it is in evidence.

Mr. Stearns: O, we have a right to have it explained, I presume, before it is in evidence.

The Court: Sustained.

Q. From the reading of that profile, can you tell the grade at or near Hampton?

A. Yes.

Q. Is that profile one that was in existence December 8, 1933?

A. Yes.

Mr. Stearns: We offer Defendant's Exhibit 9 in evidence.

[fol. 164] Mr. Stassen:

Q. Will you indicate the point at which the accident happened, approximately?

Mr. Stearns: Plus .68, is that it near there?

A. Yes.

Mr. Stassen: No objection.

The Court: Received.

Q. From an examination of that profile, can you tell us the grade at and near Hampton?

A. Yes.

Q. Say for a distance of 1,000 feet north of Hampton to 1,000 feet south of Hampton?

A. 1,000 feet north of the station at Hampton is one per cent ascending grade.

Q. Coming to a point where the grade descends to the south from that point to Randolph, what is the grade?

A. Commencing at a point about 2,000 feet south of the depot of Hampton the grades starts to descend, and it descends for approximately 2,500 feet, thence it is practically level for about 3,000 feet, and then it begins to descend again in what is known as the sand cut, a common term we have in railroad language on the road out there.

Q. How far is that sand cut from Hampton?

A. About 1.2 miles.

Q. What is the descending grade, what is the percentage?

A. The grade is eight-tenths per cent; that is eight feet in one hundred.

Q. And how far does that descending grade go?

A. Well, the total descending grade from the sand cut [fol. 165] to the end of the grade, is two miles, just a little less than two miles.

Mr. Stearns: You may inquire.

Cross-examination:

Mr. Stassen:

Q. As I understand it, you state that just out of Hampton the descending grade is 1.2?

A. No, sir, which side of Hampton?

Q. South of Hampton?

A. No. For a distance of approximately 2,000 feet south of Hampton there is a slight incline, and then it starts to descend, I called it practically level, I believe, when I testified before.

Q. North of Hampton you say the up-grade is one per cent?

A. Yes, the up-grade is one per cent.

Q. Does that mean ten feet?

A. Ten feet to the hundred, or one foot to the hundred.

Q. One foot per hundred?

A. Yes.

Q. And then you say the grade down hill is about 1.2 miles out of Hampton and continues all the way down past the point of this accident?

A. It is not the same grade, I said it was a descending grade, starting at a point 2,000 feet east of Hampton and descends about 2,000 feet further, then there is a stretch of level track until you get to this sand cut, then there is a descending grade down to approximately two miles.

Q. Between what mile posts did this accident happen?

[fol. 166] A. Between 395 and 396.

Q. On the Exhibit the mile posts are indicated in the upper part by a square figure?

A. Yes.

Q. What is the unit of these thin lines running horizontally?

A. The heavy lines represent one thousand feet, each one of these small lines represent one hundred feet. That is horizontally.

Q. Vertically what do the various lines represent?

A. Each one of the heavy lines represents five feet, and each one of the small lines represents one foot.

Q. So that on this map a drop of five feet is bordered by the same space as a distance along the track of one hundred feet?

A. A drop of five feet would be a five per cent grade.

Q. And it is bordered on the map by the same amount of space as the distance along the track of one hundred feet?

A. Yes.

Q. So that in figuring your drops you have one scale, and in figuring the length of the track you have another scale?

A. That is right.

Q. About where is Hampton itself indicated on that map?

A. The station is indicated up ahead of where your finger is.

Q. Shortly passed mile post 398?

[fol. 167] A. Yes.

Q. From there we have a slight downgrade and a slight upgrade to 397 and from mile post 397.

A. Practically to 395.

Q. Yes, practically to mile post 395 you are going down hill?

A. Yes.

Q. And this accident happened after the train had gone down hill approximately a mile and a half?

The Court:

Q. What is the total drop in feet between Hampton and the place where the accident happened?

A. Fifty-nine and seven-tenths feet.

Q. That is a distance of approximately two and three-fourths miles?

A. Very nearly three miles.

The Court:

Q. Then it would be an eight foot drop for every one hundred feet?

A. Eight-tenths foot.

Mr. Stearns:

Q. Now how far north of Hampton does the grade begin to ascend?

A. The grade starts to ascend about half way between mile post 402 and mile post 403, about one-fourth mile of the depot at Empire.

Q. What is the per centage of grade between Empire and Hampton?

A. It varies up to a minimum of one and twenty-eight one-hundredths per cent, that is, one and twenty-eight hundredths feet per hundred feet.

[fol. 168] The Court:

Q. One thousand feet, is it not?

A. No, sir, one hundred feet.

Recross-examination.

Mr. Stassen:

Q. As I understand it, the grade up here, one thousand feet north of Hampton is a more severe grade than the grade down here, the grade at the point of the accident?

A. At what distance north of Hampton?

Q. At one thousand feet immediately north of Hampton?

A. Well, at one thousand immediately north of the Hampton depot it is about the same as where the accident happened, but immediately north of that there is a break in the grade for a thousand feet, which runs to one per cent.

Q. There is a one per cent rise?

A. Yes, then it drops down again to eight-tenths per cent.

Q. In other words, coming down to Hampton, just before you get to Hampton, there is a one per cent rise?

A. That is right.

Q. At the point of the accident you would be going down an eight-tenths per cent decline?

A. That is right.

Q. Which is a less decline than the incline north of Hampton?

A. Slightly.

Q. Slightly less?

[fol. 169] A. Yes.

Q. Are you familiar with the scene of the accident?

A. Well, I am familiar with the general track conditions in that vicinity.

Q. Showing you Plaintiff's Exhibit C, does that portray this gradual decline down toward Hampton to the right?

A. No, I think you cannot tell anything about the grades of tracks from a picture like this.

Q. You cannot?

A. No, sir, the grade is there all right, but you have this long field out in front of you here, with an entirely different slope of ground. If the camera had been set up at a certain point with reference to a certain grade on the track, then it might portray the grade, but this does not portray the grade, that is a picture of it all right.

Q. It shows how that particular part of the track looks in relation to the field?

A. Yes.

Q. And in fact, to a layman, this gives a better idea of the grade than does Defendant's Exhibit 9, which uses one scale vertically and a different scale horizontally?

A. No, I would not say that. The grade of the track as shown in the picture depends entirely on how the camera is set up, it might be absolutely level and still look like that on the picture.

Q. That is true, but in order to show the lay of the grade line, that is to use the same scale for the drop as you use [fol. 170] for the distance you cover on the track, you would need a map twenty times this long, would you not?

A. That is right.

Q. In other words, the decline is one-twentieth of what it appears to be in that line on the map?

A. Well, if you are using the line drawings on the map as an indication of this grade then, of course, what you say would be true. However, you will notice that the actual grade is indicated in each case. Wherever there is a break of grade it is indicated and so drawn on the paper as nearly as it can be.

Q. Now, this straight line indicates the grade?

A. Yes.

Q. That is the grade line?

A. Yes.

Q. But the drop of that line, as appears on that paper, does not indicate the actual drop as you would see it on the track?

A. No.

Q. The actual drop, as you would see it, would be one-twentieth as severe as it appears on the paper.

A. Well, the actual drop, of course, would be the figures indicated on the grade.

Q. And it would appear one-twentieth as severe as that?

A. Yes.

Q. Because you are using a twenty point different scale to show the drop of the scale?

A. That is right.

Q. An eight-tenths per cent grade on the railroad is what is known as a very gradual grade?

[fol. 171] A. It is considered quite heavy.

Q. You have grades much more severe than that up and down hill?

A. Not much, one per cent is our maximum on that part of the railroad.

Q. What is the per cent of grade coming out of Inver Grove up to Rich Valley?

A. For the most part it is a little under one per cent, there is some one per cent grade.

Q. That is a grade a little more severe than this?

A. Just two-tenths.

Q. These two rules introduced in evidence, which are in the General Rule Book of the Company, marked Defendant's Exhibit 3, are included in a Book of Rules addressed to various types of employes?

A. What two rules do you refer to?

Q. The two rules in this Book of Rules, containing a total of 1,057 rules, in this book marked Defendant's Exhibit 3, which has been introduced in evidence?

A. What is the number?

Q. Page 171, I think.

The Court: No. 944.

Mr. Stassen:

Q. 944 and 948.

A. Those two rules are addressed to signal maintainers.

Q. Signal maintainers?

A. Yes, the Book of Rules is subdivided into a number of various sections, and these various sections are addressed [fol. 172] to different classes of employes.

Q. And there are some sections and general regulations and rules?

A. There are some sections and general regulations and rules that cover all employes.

Q. And in addition to that this Defendant's Exhibit 3, Book of Rules, was issued on May 1, 1923, that particular edition?

A. Yes, that is the date in the book.

Q. And in addition to that Defendant's Exhibit 5, which contains forty-six pages of material, was issued in 1924?

A. Yes.

Q. And Defendant's Exhibit 6 was issued October 28, 1929?

A. Yes.

Q. And Defendant's Exhibit 1, the Special Rules, issued November 1, 1932, the two rules in that Exhibit are included in the 1933 rules?

A. Yes.

Q. Directed to maintainers, signal men, and so forth?

A. Yes.

Q. Now in addition to these, did your office issue other circular letters, circular rules and instructions?

A. Pertaining to different things, yes.

Q. Pertaining to signal maintenance men?

A. Yes.

Q. You very frequently communicate with your employes of various type by mimeograph circulars?

[fol. 173] A. I would not say frequently, but it is done right along whenever the occasion arises requiring it the mimeograph is used, so we don't have to use so many individual letters.

Q. How are the numbers on these circular letters devised when you start?

A. Well, as I recall it, they are still using a continuous number form, I cannot say for how many years back.

Q. Well, do you have separate numbers for the division and for the engineer of maintenance of way, or do they use the same circular number?

A. Who?

Q. The office of the engineer, maintenance of way, and the Chicago Great Western Company office of the Division Engineer?

A. Well, that is the same.

Q. The same number?

A. The only difference is that some years ago the division man was called engineer, maintenance of way.

Q. It is a different name then for the same man?

A. Yes, that is it.

Q. Now, calling your attention to Defendant's Exhibit 4, dated November 13, 1928, "Circular No. 485"?

A. Yes.

Q. On Defendant's Exhibit 8, December 16, 1932, you see Circular No. 687?

A. Yes.

Q. Does that mean that two hundred and two circulars [fol. 174] were sent out from your office between that time?

A. Yes, it does, addressed to all classes of employes in the Maintenance of Way Department, however, it might be that none of them were addressed to the signal maintainers, they might have been addressed to signal foremen, bridge and building foremen, motor car repair foremen, and telegraph linemen.

Q. Have you anything further to add to that?

A. I guess that is all.

Q. It appears in evidence that everyone you have introduced in evidence here is addressed to section foremen, B. & B. foremen—what is that?

A. B. & B. foremen means bridge and building foremen.

Q. And signal maintainers?

A. That is right.

Q. And that includes practically all classes of employes under your office, does it not?

A. No, in addition to that at that time we had motor car repairmen, telegraph supply men, and water supply foremen.

Q. The number of those employed in this division would be rather small?

A. Yes.

Q. In all those three classes you probably had——

A. Well, there were not so many.

Q. You probably had a dozen men in those three classes?

A. There might have been a few more.

[fol. 175] Q. But the section foremen, B. & B. foremen, and signal maintainers, make up the big class of your employes?

A. They constitute a big number of our employes.

Q. Now, you stated that you were superior officer of signal maintainers?

A. Yes.

Q. Through the supervisor of the maintainers?

A. Yes.

Q. So I take it that your are quite familiar with signal maintainers' work?

A. Only in a general way.

Q. They have a general territory. Take the Randolph territory, how many miles does that cover, about?

A. I do not know exactly what it did cover at that time.

Q. How far is it from Empire to Hampton, approximately?

A. I would have to look that up, it is approximately thirteen miles.

Q. What are the various types of duties of a maintainer, along his track?

A. Well, the maintainer first of all maintains the signals.

Q. Where are these signals located?

A. Along the right-of-way. The signals usually are located at the main line switches.

Q. About how far apart?

A. It varies depending on how far the switches are apart. The average distance is the distance between stations. In [fol. 176] other words, you might have two towns where there would be a pair of signals on the east side of one town, and then there would be no more signals until you got to the west switch of the next town. Sometimes they have intermediate signals.

Q. Near the scene of the accident there are two signals right there within a half a mile?

A. Yes, there happens to be intermediate signals there.

Q. Then there is another signal up between that and Hampton, isn't there?

A. No.

Q. On that curve?

A. Well, at the switch.

Q. These signals have lights on them at night?

A. Yes.

Q. How are those lights operated?

A. Some of them are operated by lamps, some of them are operated with electricity, storage battery.

Q. From Empire to Hampton, how are most of them operated?

A. I cannot give you that definitely because I do not know.

Q. If they are operated by lamps, how often do they need refilling?

A. I think they refill them every three or four days. I cannot answer that definitely either.

Q. And does he also take care of crossing bells?

A. If he has any on his territory.

Q. Any other important classes of work?

[fol. 177] A. Well, in addition to the signals they have the telegraph lines.

Q. They have the telegraph lines to take care of?

A. Yes, that is on this particular stretch of track.

Q. And to get from one of these signals to another, and one crossing bell to another, the road supplies them with this speeder?

A. Yes.

Q. And that speeder is expected to be run upon the track?

A. At any time.

Mr. Stassen: That is all.

Redirect examination.

Mr. Stearns:

Q. This Defendant's Exhibit 9, profile of the track near Hampton and Randolph, is that drawn to scale?

A. It is drawn to scale, but on a pretty small scale.

Q. Does it give accurate information regarding the grades?

A. It does, because the grades are on it.

Q. Counsel asked you about the duties of a signal maintainer. What duty has a signal maintainer, if any, regarding obtaining of line ups?

Mr. Stassen: Just a minute, M Stearns. May I ask a question?

Mr. Stearns: You may.

Q. Are these instructions to signal maintainers in writing?

[fol. 178] A. Yes.

Mr. Stassen: Objected to as not the best evidence.
The Court: You may answer.

A. Why his duty is to get a line up for his own protection.
Q. From whom does he get that line up?
A. From the dispatcher.

Recross-examination.

Mr. Stassen:

Q. You have placed in evidence your company rules as to line ups, have you not?
A. Yes, I think so.

L. T. Miller, being called as a witness on behalf of the defendant, was first duly sworn, and testified on direct examination as follows:

Q. What is your name?
A. L. T. Miller.
Q. Where do you live?
A. Oelwein, Iowa.
Q. You are Chief Electrician for the Chicago Great Wes ern Railroad Company?
A. Yes.
Q. How long have you been employed by the Chicago Great Western Railroad Company?
A. Twenty-seven years.
Q. How long as Chief Electrician?
A. About five years.
[fol. 179] Q. Were you on No. 8 at the time of the death of Mr. Rambo?
A. Yes.
Q. What car were you sitting in?
A. The third car back from the engine.
Q. What type of engine was used?
A. We call it the five hundred type.
Q. Do you know the number of cars attached to it?
A. Yes.
Q. What were they?
A. Combination mail and baggage car, long steel coach and combination sleeper and buffet car, baggage car.
Q. There were no numbers on those cars?

A. No.

Q. You know the type of car?

A. Yes.

Q. Are you familiar with the headlight of No. 504?

A. Yes.

Q. Are you familiar with the headlight used on No. 504 at the time of the accident and death of R. C. Rambo?

A. Yes.

Q. What type headlight is that?

A. Sunbeam gauge, stereopticon globe.

Q. From whom are those stereopticon globes purchased?

A. The Graybar Electric Company, they are made by the Graybar Electric Company.

Q. State whether or not that is a standard headlight.

[fol. 180] Mr. Stassen: That is objected to as calling for a conclusion of the witness, no foundation laid and immaterial.

The Court: Sustained.

Q. You are Chief Electrician of the company?

A. Yes.

Q. Familiar with the rules and regulations of interstate commerce?

A. Yes.

Q. When were these lights purchased?

A. The cages were purchased twelve years ago.

Q. And they are the same type used on all other railroads?

A. Yes.

Q. Known as a standard light?

A. Yes.

Q. Did you attend a conference at the time it was determined to purchase this particular type of light for No. 504?

A. Yes.

Q. What tests, if any, were made to see whether or not these lights conformed to the requirements of the interstate commerce commission?

A. A series of tests were made of different makes of equipment, and we went out in the country with a locomotive and there was a master mechanic, an engineer, a man acting as chief electrician, I was electrical foreman at that time, and the road foreman of engines, and there were others there at that time, I do not remember just who they

were now, and we measured off distances to check up whether or not they met the requirements.

[fol. 181] Q. What distances did you measure off?

A. Eight hundred feet.

Q. And what did they do, what were you able to see in that distance, did they have a man standing on the track, or what?

A. We had a man with a dark suit of clothes on, and a dark hat, and he walked away from the engine, and as he would disappear out of sight we would give him a toot of the whistle, then he would stop and we would measure the distance.

Q. What distance did you find with that type of headlight?

A. I do not remember just the number of feet now, but it was in excess of eight hundred feet.

Q. Then you elected to purchase that type of light?

A. Yes.

Q. From whom did you purchase it?

A. The cages, which enclose the globe, were purchased from the Sunbeam Electric Company.

Q. You say that you are familiar with lights used on other railroads?

A. Yes, in most cases.

Q. Is this what is known as a standard electric headlight?

A. Yes.

Q. At the time of the accident to Roy Rambo, when the train stopped what did you do?

A. I immediately checked up to see if the headlight was burning.

Q. What did you do to check up to see if the headlight was burning?

[fol. 182] A. I looked down the track, I got up along side the engine and checked the distance.

Q. What examination did you make of the light or reflector?

A. I looked up to see that everything was intact, to see that nothing had happened to it.

Q. Were there any spots on it?

A. No, sir, there were no spots on it.

Q. Was it clear?

A. Yes.

Q. Do you know whether or not the light was dim or bright?

A. The light was bright, full brilliancy.

Q. Do you have any different illumination other than the light being dim or brighet or out?

A. Those are the three positions?

Q. And when a light is turned on bright does it remain bright until it is turned off, or goes out of its own accord?

A. It is full brilliancy until it goes out.

Q. What test did you make to see whether this light was proper at that time you made the test immediately after Rambo's death?

A. I counted the number of telegraph poles.

Q. How many did you count?

A. I counted seven.

Q. Where were these telegraph poles?

A. On the right hand side of the track going toward Randolph.

Q. How close to the track?

A. Forty to fifty feet.

Q. How far apart were those telegraph posts?

[fol. 183] A. I understand that they are 176 feet.

Mr. Stassen. Object to what he understands.

The Court: Sustained.

Q. Do you know the average distance of those telegraph posts?

Mr. Stassen: Same objection.

A. No, not for sure.

Q. How far could you see the seventh telegraph pole?

A. Approximately one thousand feet.

Q. Now, did you notice any marks on the rails?

A. No, sir.

Q. You did not examine the rails?

A. No, sir.

Q. When the engine came out at Minneapolis, was it inspected?

A. Yes.

Q. By whom?

A. The electrician at the roundhouse. They have instructions to inspect all engines before departure.

Q. Would that include the headlight?

A. Yes.

Mr. Stassen: May I ask a question.
The Court: You may.

Mr. Stassen:

Q. Were you present when the locomotive left Minneapolis?
A. No, sir, well, yes, I was, but I did not see the inspection.

Mr. Stassen: I move to strike the testimony as to inspection.

[fol. 184] Mr. Stearns:

Q. Let me ask you this: Does the electrician at the roundhouse work under your supervision?
A. Yes.
Q. State whether or not he is instructed to inspect the headlight of locomotives before they leave?

Mr. Stassen: That is objected to as immaterial.
The Court: Sustained.
Mr. Stassen: I now move to strike the testimony as to inspection.
The Court: Stricken.
Mr. Stearns: I presume an employer or supervisor can tell the duties of men working under him. I am merely laying a foundation to show that it was part of his duty. No one knows a man's duty better than his supervisor.
The Court: Same ruling. The objection is sustained.

Q. Did you ride to Oelwein on the same train?
A. Yes, sir.
Q. Did you make any other examination of the headlight?
A. I did not.

Cross-examination.

Mr. Stassen:

Q. Where did you get on this train?
A. Minneapolis.
Q. What time?

A. Well, I could not say for sure whether I got on at the Island or the depot.

[fol. 185] Q. You could not say whether you got on at the Island or the depot?

A. No.

Q. Where is the Island?

A. Where the engines and trains depart from.

Q. Where the engines and trains depart from?

A. Yes; they are stored there.

Q. What time did you get on?

A. I could not say as to that.

Q. Can you tell us approximately?

A. Shortly before the departure?

Q. Approximately what time?

A. It might have been 3 o'clock.

Q. You say it might have been 3 o'clock?

A. Yes.

Q. Did you get off the train at St. Paul?

A. Yes.

Q. How long?

A. Just while the train was stopping there, and then I got back on.

Q. You were riding on a pass, I suppose?

A. Yes.

Q. And were you required to make out any kind of a slip and give it to the conductor?

A. Yes.

Q. You have an annual pass?

A. Yes.

Q. You make out a slip that shows the pass number and date?

A. Yes.

Q. And where you are going?

A. Yes.

[fol. 186] Q. You hand that to the conductor at the time you get on the train or when he comes through the train?

A. Yes.

Q. What happened before you arrived at Hampton on this night?

Mr. Stearns: Object to that as incompetent, irrelevant and immaterial.

The Court: You may answer.

A. At what point do you refer to?

Q. Well, was there an unusual occurrence on this trip?

A. At a side crossing, on this side, or south of Rich Valley, we were detained there.

Q. You were detained there?

A. Yes.

Q. In connection with an accident?

A. Yes.

Q. What did you do at the time of that accident?

A. I assisted in getting the truck off of the track, taking the remains from the truck, putting them in the baggage car, the remains of one man, and bringing it back and putting it in the depot.

Q. Did you at that time make any inspection of the lights?

A. I noticed that the glass was not broken, yes.

Q. Did you notice anything else?

A. No, sir, that is the only thing I noticed, I just glanced up at the glass.

Q. Did you notice whether or not the light was burning at that time?

[fol. 187] A. It was not.

Q. It was not burning?

A. No, sir.

Q. Are you sure of that?

A. I am sure it was not burning at the time I looked at it, yes.

Q. And that, I suppose, was after the first accident?

A. Right after the first accident.

Q. Did you stay there at the scene of the accident with the train until it pulled out?

A. Yes, sir.

Q. You were delayed there about how long?

A. I could not say, it was an hour or so, about one hour.

Q. You could not say just how long?

A. No.

Q. I take it, as an electrician, then, you are not much interested in time on the railroad?

Mr. Stearns: Just a moment. That is objected to as argumentative.

The Court: Sustained.

Q. And after you once started going from Rich Valley, did the train stop before the second accident?

A. No, sir.

Q. The movement was continuous?

A. Yes.

Q. And you rode during that entire trip from Rich Valley down to where the train stopped after the second accident, where?

A. I rode inside of the long part of the coach, on the left hand side, in the first seat.

[fol. 188] Q. On the left hand side in the first seat?

A. Yes.

Q. So you at no time were up by the engine until after the train came to a stop after the Rambo accident?

A. No.

Q. Was anybody along with you when you went up to the engine?

A. I could not say. There was people running back and forth in all directions there, but no one in particular with me. I don't think there was any one along with me.

Q. You do not think so?

A. No.

Q. Did you speak to any members of the train crew at that time?

A. Yes.

Q. To whom?

A. I asked the engineer what was going on now.

Q. I suppose he told you he hit the maintenance man?

A. He did not make no reply.

Q. He made no reply?

A. No, sir.

Q. How far away were you from him when you asked him that?

A. Oh, twenty-five feet.

Q. Did you say anything else to him?

A. No, sir.

Q. In other words, you did not identify yourself as being the chief electrician?

A. No, sir.

[fol. 189] Q. Where were you standing when you saw down the track?

A. On the lefthand side of the engine, about even with the pilot beam.

Q. That is right out in front?
A. Yes.
Q. And on the right-of-way?
A. Right close to the engine.
Q. How high is that light above then?
A. About six or seven feet above my head.
Q. And how high above was the engineer seated?
A. How high above would he be seated?
Q. Yes.
A. About ten to twelve feet.
Q. Which side of the beam of light did you see these telephone poles on?
A. It was directly, about at the right-hand side.
Q. The right-hand side?
A. Yes.
Q. And as I understand it, you say you counted seven poles stretching down in a straight line on the right-hand side?
A. Well, it was possibly about the center, from the center to the right-hand side.
Q. What do you mean by that?
A. Well, the beam of light seemed to shine on the poles down the track.
Q. You say that the beam of light seemed to shine on the poles instead of the track?
A. It was on the track too.
Q. How wide is the main focus of beam of that light?
[fol. 190] A. At that distance it is quite wide, I would say it extends over the entire right-of-way.
Q. Are these poles all at the very edge of the right-of-way?
A. Close to it.
Q. Then you say these poles seem to be about the middle of the beam?
A. No, the beam was shining on there, but at that distance I would call the radius of the right-of-way the center of the beam.
Q. Well, was the center of the beam in the center of the track?
A. Yes; it followed the track straight down.
Q. For the length of seven poles?
A. Yes.

Q. And then the seven poles would be stretching in a line on the right-hand side of the beam?

A. Yes.

Q. Do you know about where that locomotive stopped after the accident?

A. Well, I could not say, no, the country is all strange to me there.

Q. The country is all strange to you there?

A. Yes.

(A five minute intermission was taken at this time.)

Q. Mr. Miller, do you know what type of switch is used in turning on that light on locomotive 504?

A. Yes; it is a single pole, double throw switch.

Q. Double filter?

A. Double throw.

Q. What?

[fol. 191] A. Double throw—t-h-r-o-w.

Q. Can you explain more in detail just how that operates?

A. Yes, it operates on a pivot on the center, you throw it one direction and it will be dim, you throw it completely over and it will be bright, you have it straight out and it will be off, there will be no light.

Q. Where is that located with reference to where the engineer sits?

A. That is right over his head.

Q. He can reach it from where he sits?

A. Yes.

Q. All he has to do is throw that switch and make it dim, bright, or off?

A. Yes.

Q. Just by throwing it?

A. Yes.

Redirect examination.

Mr. Stearns:

Q. Were you with Mr. Rowe at the time this test was made of the headlight later on?

A. Yes.

* * * * * * *

FRANK BABCOCK, being called as a witness on behalf of the defendant, was first duly sworn, and testified on direct examination as follows:

Examined by Mr. Stearns:

Q. What is your first name?

[fol. 192] A. Frank.

Q. Babcock. B-a-b-c-o-c-k?

A. Yes.

Q. Where do you live?

A. Minneapolis.

Q. What is your occupation?

A. I am an electrician.

Q. Electrician for the Chicago Great Western Railroad Company?

A. Yes.

Q. How long have you been in its employ?

A. Since 1911.

Q. You work in Minneapolis as an electrician?

A. Yes.

Q. Have you been employed in Minneapolis as an electrician since 1911?

A. No, not all that time.

Q. How long have you been in Minneapolis?

A. Since 1920.

Q. You work under Mr. Miller, the gentleman who just left the witness stand?

A. Yes, sir.

Q. Are you familiar with engine 504?

A. Yes.

Q. Do you recall the night that Mr. Rambo was killed?

A. No, I work days.

Q. Did you prepare 504 before it left?

A. I did.

Q. On December 8, 1933?

A. Yes.

Q. Now, what did you have to do in preparing that engine?

[fol. 193] Mr. Stassen: May I question.

Mr. Stearns: Go ahead.

Mr. Stassen:

Q. I presume you are on duty every day there, five days a week, or something like that?

A. Seven days a week.

Q. And locomotives leave there quite frequently during the day?

A. Yes.

Q. Is there anything that calls your attention to December 8?

A. No.

Q. You could not positively recall December 8 now, any different than any other day?

A. No, but that is a daily occurrence, part of my daily duties.

Q. And that is the only recollection you have, that it is a daily duty?

A. Yes.

Q. You have no particular recollection of December 8, 1933, and locomotive No. 504?

A. No.

* * * * * * *

Mr. Stearns:

Q. Did you prepare No. 504 on December 8?

A. Yes.

Q. What did you do?

A. I went on the engine, turned the steam on in the turbine, waited until it got up to speed, looked the lights over in the cab, tried the switch, and went out to look at the headlight. I looked in the headlight to see that the wiring and everything was all right, and then I looked at the light [fol. 194] where it shines on the wall in the roundhouse for focus, and there are two other lights, one at the rear and one by the cab outside, and I looked at those, and everything was all right, so I turned her off and went away.

Q. Is that a part of your daily duties to inspect headlights before those engines leave the roundhouse?

A. Sure, all of them.

Q. And No. 504 leaves every day?

A. No, not every day.

Q. Every other day?

A. It is one of the engines on that run.

Q. Well, now, what do you mean by putting the light on the wall to determine the focus? Explain what that means.

A. Well, if the light is out of focus, there is a spot on the wall about that big around (indicating), and if that is perfectly bright we know the light is not out of focus.

Q. If you find anything defective about the light, what do you do?

* * * * * * *

A. I do not understand.

Q. Assuming the light is not in proper shape to go out on the road, then what do you do with it?

A. You mean if it is out of focus?

Q. If it is out of focus, or not a proper light, what do you do with it?

A. If it is out of focus, there is an adjustment in the lamp to move back and forth to get it in proper adjustment.

[fol. 195] Q. Then you adjust it?

A. Yes.

Q. If the light is otherwise defective, what do you do?

A. You mean if it does not burn bright enough, or something?

Q. Yes?

A. We test it out with the volt meter, if there is any question about anything being the matter with it.

Q. What is a volt meter?

A. A volt meter is an instrument for testing the voltage or output of a dynamo, that is the voltage output.

Q. Is this light known as a standard light?

A. Yes.

Q. What is meant by a standard light?

A. A light that has been inspected and accepted as standard.

Q. A light commonly used on the railroad?

A. Yes.

Q. Are you familiar with rules of the Interstate Commerce Commission with reference to headlights on road engines?

A. I think I am.

Q. Is this type of light one that complies with that standard?

Mr. Stassen: Objected to as calling for a conclusion of the witness and immaterial.

The Court: You may answer.

Q. Is this type of light used on Locomotive 504 one that complies with that standard?

A. It is.

[fol. 196] Cross-examination.

Mr. Stassen:

Q. You say there is a dynamo that furnishes the current for this light?

A. Yes.

Q. And sometimes this dynamo does not furnish sufficient current to make the light bright enough?

A. Yes, there are occasions when they do not.

Q. You find that out with the volt meter, don't you?

A. Yes.

Q. And you have to repair the dynamo, I suppose, sometimes?

A. In most cases it is in the back end of it, it is run with the steam turbine, and we generally find that it is not running fast enough.

Q. Steam turbine?

A. Yes.

Q. Has it a separate turbine?

A. Yes, it is what is called a turbine generator.

Q. The turbine has no connection with the movement of the train itself?

A. No.

Q. It is just separate?

A. Yes, it is a separate machine.

Q. Where is that turbine located?

A. By the head of the cab, top of the boiler.

Q. Which side?

A. Right in the center on top.

Q. In testing these lights, do you turn them on dim and bright both?

[fol. 197] A. Yes.

Q. What is the difference between the two?

A. Well, when it is turned on dim, it only burns up to about half the meter power of what it does when it is turned on bright.

Q. Half the meter power of what it does when it is turned on bright?

A. I mean half of bright, the light is just about one-half as bright when it is dim as it is when it is bright, you see.

Q. You mean by that it will show only one-half the distance?

A. Yes.

Q. Is there any difference in the focus of dim and bright?

A. No.

Q. You say the focus is adjustable in the headlight?

A. Yes.

Q. By a screw?

A. There is a screw in there that moves the socket back and forth.

Q. You say sometimes you find the headlight out of focus?

A. Yes, but very seldom.

Q. How does that get out of focus?

A. From somebody tinkering with them, or it might get loose, and work loose itself, you see?

Q. Is there some kind of a lock-nut or something?

A. Yes, a thumb screw is what it is.

Q. Could that get loose from a blow?

[fol. 198] A. Not very well, not if it is tightened properly to start with.

Q. You say sometimes you find that out of focus?

A. Yes, but very seldom.

Q. And you have to take that screw, and put it back into focus?

A. Put it back where it belongs.

Q. If the light is out of focus, what is the effect?

A. You have no light down the track where it should be.

Q. How many years experience have you had in inspecting and adjusting these lights?

A. Well, this particular type of lamp, about fifteen years.

JOHN REISNER, being called as a witness on behalf of the defendant, was first duly sworn, and testified on direct examination as follows:

Examination by Mr. Stearns:

Q. What is your first name?

A. John.

Q. Reisner?
A. Yes.
Q. Where do you live?
A. Oelwein, Iowa.
Q. By whom are you employed?
A. Chicago Great Western Railroad Company.
Q. In what capacity?
A. Electrician.
[fol. 199] Q. How long have you worked for the company in that capacity?
A. Fourteen years.
Q. How long at Oelwein, Iowa?
A. Fourteen years.
Q. Are you familiar with Engine 504?
A. Yes.
Q. When that comes in to the roundhouse at Oelwein, Iowa, do you have anything to do with inspecting it?
A. I take a check on all of them when they come in.
Q. Is that a part of your duty to check all engines that come in that roundhouse?
A. Yes.
Q. Do you recall Engine 504 coming into the roundhouse at Oelwein, Iowa, on the eighth of December, 1933?
A. Yes.
Q. How do you recall it?
A. Well, I knew about the accident, see.
Q. Did you make any inspection of that engine?
A. I did.
Q. Did you inspect its headlight?
A. I did.
Q. What condition did you find it in?
A. One hundred per cent.

Mr. Stassen: Object to that as no proper foundation laid and immaterial.

Mr. Stearns: I might say that we will put the Engineer on who was with the headlight when it went down there.

The Court: The answer may stand.

[fol. 200] Cross-examination.

Mr. Stassen:

Q. Where did you make this inspection?
A. I made the inspection at Oelwein.

Q. In the roundhouse?
A. Yes.
Q. When you made the inspection, I suppose the light was twined on bright?
A. Yes.
Q. Did anybody help you make that inspection?
A. No, sir.
Q. You were all alone?
A. Yes.
Q. Are you sure of that?
A. Yes.
Q. Were you there when the locomotive was brought into the roundhouse?
A. I was.
Q. The engine was late, was it not?
A. It was late.
Q. I suppose you were waiting for it?
A. Yes.
Q. You proceeded at once to make your inspection?
A. Yes.
Q. And no one else was there?
A. No, sir.
Q. Did you see Mr. Miller that night?
A. I did not.
Q. He was not there when you made that inspection?
A. He was not.
[fol. 201] Q. He is also your Supervisor?
A. Yes.
Q. Your Chief Electrician?
A. Yes.

Mr. Stassen: That is all.

Redirect examination.

Mr. Stearns:

Q. Was Mr. Miller on duty there that night?
A. Not that I know of.
Q. And are you the only electrician at the roundhouse?
A. Yes, at night.
Q. At night?
A. Yes.

C. H. BURNHAM, being called as a witness on behalf of the defendant, was first duly sworn, and testified on direct examination as follows:

Examination by Mr. Stearns:

Q. What is your name?
A. C. H. Burnham.
Q. Where do you live?
A. Spring Valley.
Q. By whom are you employed?
A. The Chicago Great Western Railroad Company.
Q. In what capacity?
A. Telegraph operator and agent.
Q. Did you know R. C. Rambo?
A. I knew who he was.
[fol. 202] Q. Did you know him by sight?
A. Yes.
Q. Did you see him December 8, 1933?
A. The day of the accident.
Q. Yes.
A. Yes, I saw him the day of the accident.
Q. Did he come to you for any line up?
A. No.
Q. Did you see 504 go passed Empire?
A. I did.
Q. Where were you at the time?
A. On the platform when it went through.
Q. Did you notice whether or not the headlight was burning?
A. I did.
Q. Was the headlight burning bright or dim?

Mr. Stassen: That is objected to as no foundation laid.
The Court: Sustained.

Q. Do you know the difference between a bright and dim headlight?
A. I do.
Q. State whether or not it is part of your duties to watch these trains as they go by?
A. It is.
Q. Did you notice whether or not this headlight was burning bright or dim?
A. I did.

Q. How was it burning?
A. It was burning bright.

Cross-examination.

Mr. Stassen:

Q. Do you work at Spring Valley?
[fol. 203] A. My home is at Spring Valley, I am a Relief Agent.
Q. In other words, you mean you have no regular station?
A. No, sir.
Q. Who is the regular man at Empire?
A. I do not recall his name now.
Q. Is it Griffin?
A. Yes.
Q. He was not there that day?
A. No.
Q. You were relieving him?
A. Yes.
Q. You say you saw No. 8 go by?
A. I did.
Q. What time?
A. I could not say positively about the time now, without the train sheet.
Q. Have you that here?
A. No, sir.
Q. You cannot recall then what time it was?
A. Not positively, no.
Q. What was the condition as to daylight and darkness when No. 8 went through Empire?
A. It was just becoming dusk.
Q. Could you see a half mile by natural light?
A. I could not say as to that now.
Q. You cannot recall?
A. No. I had turned all the lights on already, that is the only thing I remember, I had turned the lights on in the office.
Q. You had turned the lights on in the office?
[fol. 204] A. Yes.
Q. When No. 8 went by, what were you doing?
A. Empire is an interlocking plant, that is, two trains cross there, and we have to line up the levers, it is part of our duties to line up the levers, get her signals when she

comes in sight, and then get out on the platform and look the train over when she goes through.

Q. And you look the train over for signals displayed on the train?

A. Yes, and to see that there were no hot boxes on the wheels, and things like that.

Q. And that is what you looked for that day?

A. Yes, sir.

Q. And where were these signals displayed?

A. The signals we get are displayed at the head end of the engine and tail end of the train.

Q. She went through there about how fast?

A. I could not say as to that, they were running normal speed.

Q. How long were you at Empire?

A. About three weeks.

Q. And do you know the approximate speed as it went through?

A. No, I do not, because I took no pains to estimate it.

Q. You say you saw Rambo that day?

A. I did.

Q. In the afternoon?

A. No. It was just about noon when I saw him.

Q. Do you know Mr. Eckstrom?

[fol. 205] A. I do.

Q. Is he a maintainer out of Empire?

A. Yes.

Q. Did you give him a line up that day?

A. Yes.

Q. How many line ups?

A. He got his regular line up.

Q. That is 7:50 and 12:50?

A. Yes.

Q. Are those the only line ups he got?

A. Yes.

Q. Were you in communication with Hampton that evening?

A. I do not recall it.

Q. Do you notify the dispatcher when every train goes through?

A. We do.

Q. Do you give him the time it goes through?

A. Yes.

Q. And that is done on a telephone which is instantaneous?

A. Yes.

WILLIAM O'NEIL, being called as a witness on behalf of the defendant, was first duly sworn, and testified on direct examination as follows:

Examination by Mr. Stearns:

Q. What is your name?

A. William O'Neil.

Q. Where do you live?

A. Randolph.

[fol. 206] Q. What is your business?

A. Assistant Supervisor of Signals.

Q. By whom are you employed?

A. The Chicago, Great Western Railroad Company.

Q. How long have you been in its employ?

A. About twenty-two years I think.

Q. Did you know R. C. Rambo?

A. Yes.

Q. Was he under your supervision?

A. Yes.

Q. What was Mr. Rambo's beat, or what territory did he cover?

A. His territory was from Empire to the west switch at Dennison.

Q. Now, how long after the accident was it before you arrived at the scene of the accident?

A. I arrived at the scene of the accident about 7:10 I think.

Q. The same evening that the accident happened?

A. Yes.

Q. What did you see there?

A. Well, everything was pretty well cleaned up when I got there, the trains had passed, the remains were picked up, and the track was clear.

Q. Did you find any marks on the ties or rails?

A. Yes, I found a mark on the tie, not that evening, but the next day.

Q. Which rail was it, the easterly or westerly rail?

A. On the tie.

[fol. 207] Q. Was it inside the rails?

A. It was inside the rails.

Q. Did you find any debris from the handcar about that place?

A. What is that?

Q. Did you find any pieces of the handcar about that spot?

A. Yes, starting in at that spot.

Q. How far was that place from Hampton, approximately?

A. O, I would think that was in the neighborhood of probably a mile and a quarter, maybe.

Q. Do you know whether or not signal maintainers are provided with lanterns for their handcars?

A. They are provided with red and white lanterns for their handcars.

Q. Was Rambo provided with such lanterns?

A. Yes.

Q. Was it any part of his duty to have those lanterns?

Mr. Stassen: That is objected to as not the best evidence.

The Court: You may answer.

A. Yes.

Q. Where did he keep the lanterns?

A. His duty was to keep the lanterns on his handcar at all times.

Q. Did he have any duties with reference to cleaning lanterns and filling them?

A. Yes.

Q. Do you know where the tool house is that Rambo kept?

[fol. 208] A. Yes.

Q. What did he keep the tool house for?

A. He kept tools, materials, and his motor car in the tool house.

Q. Did you go to the tool house afterwards?

A. Yes, I went to the tool house afterwards.

Q. How soon after the accident?

A. I was there the same night, and I was there the next day again.

Q. Did you find any lanterns there?

A. Yes.

Q. What lanterns did you find?

A. His red and white lanterns.

Q. Were those filled or not?

A. They were filled and cleaned very neatly.

Q. Did you find anything else there?

A. Well, his tools and material were all there.

Q. Showing you Defendant's Exhibit 3, I will ask you whether or not you found that Book of Rules in Rambo's files?

A. That Book of Rules was found in Rambo's shop, yes.

Q. And on the inside of the cover is signed "R. C. Rambo". Is that Rambo's signature?

A. It looks very much like it, but I cannot swear that it is his signature.

Q. Do you know whether or not he kept a file in the tool house?

A. Yes, sir.

Q. And you say you found that Book of Rules in that file?

A. No, sir, this Book of Rules was in the cupboard.

[fol. 209] Q. Showing you Defendant's Exhibits 4, 6, 7 and 8, I will ask you whether you ever saw those before?

A. Yes, sir.

Q. And your initials appear on the bottom of those Exhibits?

A. Yes.

Q. Where did you get those?

A. I got these all out of Rambo's file in his tool house.

Q. Showing you Defendant's Exhibit 1, which have been testified to be the rules of the Chicago Great Western Railroad Company, dated November 1, 1932, have you seen those before?

A. Yes, sir.

Q. And to whom were they sent?

A. They were sent to all maintainers, bridge and building foremen, and section foremen.

Q. And do you know whether or not the signature on that receipt is that of R. C. Rambo?

A. It looks very much like his signature, but I could not swear to it.

Q. Did you at any time after December 8, 1933, make any test of the headlight on 504?

A. I was with a party who did make a test.

Q. Who was the party who did make the test?

A. Waltz, Ansyle, Halverson, Riley, Rowe, and Carlton.

Q. Who is Rowe?

A. Traveling Engine-r.
Q. Who is Carlton?
A. I understand he is the Westinghouse Airbrake man.
[fol. 210] Q. Where was that test made?
A. That was made where the accident happened.
Q. What was done?
A. A motor car, similar to the one on which Rambo was riding at the time he was hit was taken out there, and I took the motor car to the place of the accident, and placed it on the track at the point where the accident happened.
Q. Was anybody put on that motor car?
A. Yes.
Q. Then what was done?
A. Train No. 2 I believe it was, yes, Train No. 2, came down there and made the test.
Q. Were you on the engine or motor car?
A. I was on the ground down near the telegraph line.
Q. Near the motor car?
A. Yes, opposite the motor car, but down the bank.
Q. Was this test made with Engine 504, if you know?
A. It was, I think, however, I am not certain about that.
Q. You had nothing to do with making the test?
A. No, my duty was to take the motor car out there.
Q. Who was the man who sat on the motor car?
A. Waltz.
Q. Who is he?
A. Supervisor of signals for the Chicago Great Western Railroad Company.
[fol. 211] Q. Now, did the train come from the north?
A. Yes.
Q. And did it finally stop?
A. Yes.
Q. And when it stopped, did you have your back toward it, or were you looking at it?
A. I was looking at the train.
Q. Was it light at that time?
A. It was very light when the train stopped.
Q. Was this at night time?
A. It was at night time.
Q. What time was it?
A. It was about 9:45 or maybe 9:50.
Q. Was it dark at the time?
A. Yes.
Q. Do you remember the date of this inspection?

A. I do not remember the date.
Q. You do not recall when it was?
A. No, sir.
Q. Did you look at your watch?
A. I did not look at my watch, no, sir.

Cross-examination.

Mr. Stassen:

Q. You lived at Randolph at the time of the accident?
A. Well, yes.
Q. Where were you when the accident happened?
A. I was on Train No. 17.
Q. Where was that train?
[fol. 212] A. That train, at the time of the accident, was down the line, about Hayfield, probably Dodge Center, between Hayfield and Dodge Center.
Q. And where were you headed for?
A. I was going to Randolph.
Q. What time did you arrive at Randolph?
A. The train was on time, and I think they are due there about 6:20.
Q. Then what did you do?
A. I got off there and got my car and drove out to the scene of the accident.
Q. You mean you got your automobile?
A. Yes.
Q. You got out there about what time?
A. I think about 7:10 is pretty close to the time I got there, it might have been 7:15, it was right in there close.
Q. Was No. 8 still there?
A. No, sir.
Q. You were also out there the next day, you say?
A. Yes.
Q. Did you find the place where No. 8 finally came to a stop that night?
A. Yes.
Q. Where was that point, can you identify it in some way?
A. I identified it by the pieces of motor car taken off the engine and piled alongside the rail, on the right side there.
Q. And where was that with relation to the mile posts?

[fol. 213] A. I did not check it with the mile post.

Q. You did not, you say?

A. I did not check it with the mile posts, no, sir.

Q. Was there any kind of a mark there, how would you find the same spot today, for example?

A. The same spot, exactly the same spot, I do not know as I could do that.

Q. Where was that with relation to the curve?

A. That was north of the curve, there is a slight curve there, and it was just on the point of that curve.

Q. Just at the point of that curve?

A. At the north end.

Q. And the curve swings off to the left?

A. Yes, the curve swings off to the left, there is a slight curve there to the left.

Q. And do the telegraph poles follow the track?

A. Yes, the outside edge of right-of-way.

Q. Calling your attention to Plaintiff's Exhibit F, can you see faintly in the distance telegraph poles curving to the left?

A. Telegraph poles curving to the left, yes.

Q. Is that the curve to the left you were speaking of?

A. I cannot see it plain enough to be sure.

Q. You know that the poles are right alongside the track?

A. Yes.

Q. And make the same curve the track makes?

A. Yes.

Q. You recognize this as being that straight-of-way where the accident happened?

[fol. 214] A. Yes.

Q. That train stopped you say just at the point of the curve?

A. Just at the point of the curve is pretty close to where it stopped.

Q. By that you mean the north end of the curve?

A. Yes, the north end of the curve.

Q. Now, the section crew were out there before you were, were they?

A. Yes.

Q. And they were engaged in picking up pieces?

A. I presume so, I do not know.

Q. That was not your duty?

A. No, sir.

Q. You do not know what pieces of motor car, or other equipment they picked up?

A. I do not know.

Q. And you say that you entered Rambo's tool house that night?

A. Yes.

Q. Did that tool house have a lock on it?

A. Yes.

Q. What time did you enter it?

A. It was perhaps between nine and ten o'clock.

Q. That same night?

A. It was the same night, I think it was between nine and ten o'clock.

Q. Within four or five hours after he was killed?

A. Yes.

[fol. 215] Q. And that is the tool house he was responsible for?

A. Yes.

Q. And the tool house that he kept his tools and equipment in?

A. Yes.

Q. And his handcar when he brought it home?

A. Yes.

Q. And his file of all communications with the Company?

A. Yes.

Q. And you say that night you extracted from his file certain documents which have been placed in evidence here?

A. No, sir.

Q. When?

A. After that.

Q. You went in there again after that?

A. Yes, several times.

Q. These documents, Defendant's Exhibits 4, 6, 7 and 8, were in a file with a great number of other circulars, communications, and letters?

A. Circular letters and letters received, letters of instructions, and so forth.

Q. Copies of letters that he sent?

A. I cannot remember that there were any copies of letters that he sent.

Q. But you remember that there was a thick file there?

A. There was a file containing all railroad communica-

tions, all pertaining to railroad work. That is the file these were in.

[fol. 216] Q. And you extracted these particular ones?

A. Yes.

Q. And the balance you turned over to the widow?

A. No, sir.

Q. What did you do with them?

A. They are still in the tool house at Randolph.

Q. You le-t them there then?

A. Yes.

Q. And some of those were communications from the Railroad Company praising Mr. Rambo as to his conduct upon his beat?

A. I did not notice particularly what they were.

Q. But you did notice what these were?

A. My instructions were to get circular letters pertaining to the handling of motor cars.

Q. And you also picked up the Rule book?

A. Not at that time, no, sir.

Q. That was later?

A. Yes.

Q. You say that Roy Rambo worked directly under you?

A. Yes.

Q. You were Assistant Supervisor?

A. Yes, Assistant to the Supervisor?

Q. You had how many men under you?

A. Sixteen, approximately sixteen.

Q. How long had Rambo been under you?

A. He had been directly under me for about five years.

Q. In what manner had Mr. Rambo been discharging his duties as a Signal Maintainer?

[fol. 217] Mr. Stearns: That is objected to as incompetent, irrelevant and immaterial.

Q. Do you know his reputation?

The Court: The objection is sustained.

Q. —As to care and caution in obedience to rules?

Mr. Stearns: That is objected to as incompetent, irrelevant and immaterial.

The Court: Sustained.

Q. You state as to this test that took place that you do not know exactly where the motor car was located, or exactly where the train stopped.

A. On the test?

Q. Yes.

A. I do know where the motor car was located.

Q. Where was it located?

A. On the track at the point of the accident where we figure Rambo's car was hit.

Q. And where do you figure Rambo's car was hit?

A. Right near where the first marks on the tie was, from the car hitting it.

Q. How did you find that place here a few weeks ago, how did you locate it?

A. The same mark is there yet.

Q. Can you locate with reference to any telephone pole?

A. No, sir.

Q. Can you locate it upon this picture, Plaintiff's Exhibit F?

A. Well, I could measure it, it is 429 feet north of that signal.

[fol. 218] Q. You say it is 429 feet north of that signal that appears in this Exhibit, Plaintiff's Exhibit F, right there (indicating). Is that what you mean?

A. Yes.

Q. Calling your attention to Plaintiff's Exhibit C, I will ask you if that is the same signal?

A. Well, I could not say as to that signal. The signal is 395-4, an eastbound signal. This looks as if it was the same that I would not be sure of. The signal was 395-4.

Q. Does that mean that signal is four-tenths of a mile north of Mile Post 395?

A. Yes, sir.

Q. And there is another signal slightly to the south of this signal near the curve?

A. Yes.

Q. What is the number of that?

A. 394-9, I think. I am not certain about it, but I could look it up.

Q. Have you something in the court room you could look it up in?

A. I can look at the map. (Witness looks at map.) It is 394-7.

Q. And that signal is part way around the curve, is it?

Mr. Stearns: Which signal are you referring to?

Mr. Stassen: 394-7.

A. Yes.

Q. Do you know where Mile Post 395 is located with reference to the curve?

A. I do not just remember, no.

Q. On that night that you made the test, you placed the [fol. 219] motor car upon the track, 429 feet north of that signal?

A. Yes.

Q. Do you know where the locomotive stopped?

A. Yes.

Q. Where?

A. 2,327 feet south of there.

Q. That is you mean the night of the accident?

A. Yes.

Q. The night of the accident the locomotive stopped 2,327 feet south of this point where it struck the motor car?

A. Yes.

Q. That would be almost half a mile?

(No answer.)

Q. Do you know where the locomotive was standing this night while tests were being made?

A. They came to a final stop about the head of that bridge there, that viaduct.

Q. That is the overhead bridge, over the automobile road?

A. Yes.

Q. And you at that time were standing on the right-of-way?

A. Yes.

Q. Down below, by these telephone posts?

A. Yes.

Q. Near the speeder.

A. The speeder was on the track.

Q. But about even with the speeder?

A. I was standing opposite the speeder.

Q. You state the night the test was made there was a [fol. 220] considerable number of men with you. Who is Waltz?

A. They were not with me, they were making the test.
Q. Who is Waltz?
A. Supervisor of Telegraph and Signals.
Q. Who is Halverson?
A. I do not know what his title is, he is a Great Western Railroad Company man.
Q. Who is Riley?
A. Riley is the General Claim Agent, Chief Claim Agent.
Q. Who is Rumple?
A. He is Claim Agent of the Minnesota Division.
Q. Who is Rowe?
A. Traveling Engineer.
Q. Who is Carlton?
A. I understand he is the Westinghouse Airbrake man.

Mr. Stassen: That is all.

Redirect examination.

Mr. Stearns:

Q. As Mr. Rambo's Supervisor, or immediate superior, did you have a key to his tool house?
A. Yes.
Q. And you went into the tool house in the performance of your duty?
A. Yes.
Q. These reports or instructions you testified to you found, were those the only ones pertaining to handcars, [fol. 221] operation of speeders, and duties of signal men, with reference to lanterns, getting line ups, and so forth?
A. That was on his file?
Q. Yes.
A. I could not say as to that, these are the ones I was asked to look for.
Q. Did you find any other instructions regarding the operation of these speeders or the duty of signal men with reference to lanterns, lights on handcars, or obtaining line ups?

Mr. Stassen: That is objected to as repetition.
The Court: You may answer.

A. I do not remember that I did, no, sir.
Q. And you turned those over to Mr. Rumple?
A. Yes.

Q. You did not make any measurement between the handcar and locomotive when this test was made?

A. No, sir, I do not know anything about that.

Q. When you were standing there down the bank, opposite the handcar, when the locomotive came to a stop, could you see the man sitting on the handcar?

A. Yes.

Q. Distinctly, or not?

A. I could see him very plainly.

Recross-examination.

Mr. Stearns:

Q. You say your instructions were to get these specific circulars?

A. Yes, sir.

[fol. 222] Redirect examination.

Mr. Stearns:

Q. Did you lock the tool house after you went in there the first time?

A. Yes.

Q. And did you lock it each time you went in there and came out?

A. Yes.

Q. Do you know of any other instructions in writing to signal men regarding their duties in the operation of speeders, or pertaining to lights on their cars, or their duty insofar as obtaining line up of trains is concerned?

Mr. Stassen: That is objected to as immaterial, no foundation laid.

Mr. Stearns: You sort of insinuated that we only picked out what we wanted.

Mr. Stassen: I am not making any insinuation, Mr. Stearns.

The Court: You may answer.

A. Always, from time to time, instructions have been put out about securing line ups and carrying lanterns on cars. We all knew and understood that we must carry lanterns on our cars at all times.

Mr. Stassen: I move that the latter part of that answer be stricken as not responsive, immaterial.

The Court: It may be stricken.

E. L. WALTZ, being called as a witness on behalf of the defendant, was first duly sworn, and testified on direct examination as follows:

[fol. 223] Examination by Mr. Stearns:

Q. What is your name?

A. E. L. Waltz.

Q. Where do you live?

A. St. Paul.

Q. By whom are you employed?

A. Chicago Great Western Railroad Company.

Q. How long have you been employed by that Company?

A. Thirty-one years.

Q. What is your capacity now, your position with the Railroad Company now?

A. Supervisor, Telegraph and Signals.

Q. How long have you had that position?

A. Twenty-two years.

Q. Does Mr. O'Neil who just left the stand work under your direction?

A. Yes.

Q. Did you know Mr. Rambo?

A. Yes.

Q. Did he work under you?

A. Yes.

Q. Is Mr. O'Neil his immediate supervisor?

A. I would say he is, yes, just as much as I am.

Q. Are you familiar with the vicinity between Hampton and Randolph?

A. Yes.

Q. Do you know the distance between telegraph poles, between Hampton and Randolph?

A. About 175 feet, approximately that.

Q. Were you with Mr. Rowe at the time the inspection was made in the vicinity of this accident?

[fol. 224] A. I think I was.

Q. Do you recall when this was made?

A. I do not recall the date.
Q. This year or last year?
A. It was in December sometime.
Q. December of what year?
A. December of 1933.
Q. Who was there?
A. Well, there was Rowe, Rumple, Riley, O'Neil, myself, and another gentleman from the Airbrake Company.
Q. What engine was taken?
A. I could not tell you that.
Q. Who was in charge of the engine?
A. Art Rowe.
Q. Who is Art Rowe?
A. Traveling Engineer.
Q. What part did you take in making that test?
A. I sat on the motor car.
Q. O, you merely sat on the motor car?
A. Yes, I sat on the motor car.
Q. Do you know where this motor car was placed?
A. Yes, at the point where it was struck the night of the accident.
Q. How far from Randolph would that be?
A. Around two and a quarter miles approximately.
Q. Can you mark it by any other things, signals or the like?
A. No.
Q. What was done then?
[fol. 225] A. When they made the test you mean?
Q. Yes.
A. I sat on the motor car facing Randolph when Train No. 2 came down to a certain point and then stopped.
Q. And when it stopped did you have your back toward it?
A. Yes.
Q. Could you see it from where you were?
A. I could see it before it came, I could read a newspaper.
Q. You do not know, of course, how far that locomotive was from you?
A. No.
Q. Did you take any part in the measurement?
A. No.
Q. What are the duties of a signal maintainer?

A. The duties of a signal maintainer are to maintain his signals, telegraph and telephones on his district, pertaining to those things in particular.

Q. What work did Rambo have to perform?

A. Rambo had the automatic signals from the westerly switch of Dennison to Empire. He had signals to maintain, crossing bells and telephone.

Q. You said this test was made in December, isn't it a fact that it was made April 21, 1934, or do you remember the date?

A. I do not remember the date.

Q. When you went to where the handcar was how did you go there?

A. When I went out to where they made this test?

[fol. 226] Q. Yes.

A. On the motor car.

Q. Who was with you?

A. Mr. O'Neil was with me.

Q. So you did not meet any other gentleman at the train?

A. No.

Q. So you do not know what engine was making the test?

A. No.

Q. What were the duties of Rambo while he was in the employ of the Chicago Great Western Railroad Company as a Signal Maintainer?

A. To maintain all signals on his district, take care of the batteries, take care of the lights, inspect telephones, and make general repairs to telegraph lines.

Q. What were his hours of employment?

A. From eight in the morning until five in the afternoon.

Q. His duties required him to be working for the Company from eight until five?

A. Yes, excepting one hour off at noon.

Q. And then he would go to and from his home by the use of the motor car?

A. Yes.

Q. What is meant by line up?

A. They get a line up of trains every morning before going to work, and every afternoon before going to work at one o'clock.

Q. For how long is that line up good?

A. For one hour from the time the dispatcher gives it to you.

[fol. 227] Q. Is it part of their duty to get the line up?

A. If he makes a move, and there is a train that has not gone by it is part of his duty to get a line up before he moves.

* * * * * * *

Q. You say it is his duty to get a line up on trains before going on railroad tracks?

Mr. Stassen: That is objected to as not a proper statement of his testimony and repetition.

The Court: You may answer.

Q. Will you please tell me again what duty, if any, Mr. Rambo had with reference to getting line ups of trains?

A. He was supposed to get a line up before going to work at eight o'clock, which the dispatcher gives out in the morning. In the afternoon he was supposed to get another line up, and if there is a train delayed that has not moved over the district, and he wants to move with his motor car to any point he is supposed to get a line up.

Q. From who would he get that line up?

A. At any station along his district where he happened to be and by telegraph.

Q. Who would he get it from?

A. The Train Dispatcher, Agent, or Operator who may be on duty.

Q. How would he get it from the Train Dispatcher?

A. Over the telephone.

Q. These telephones connect from various station agents with the Train Dispatcher?

A. Yes.

[fol. 228] Q. They are instantaneous, are they?

A. All stations have a telephone.

Q. Now, if a train is delayed you may state whether or not it is part of Rambo's duty to ascertain by line up where the train is before getting on the track.

* * * * * * *

A. Yes, it is his duty to get a line up on that train before he moves if he is at a point where he is near a telephone.

Q. And was there a telephone in the station at Hampton in connection with the Train Dispatcher?

A. Yes.

Q. Are you familiar with those crossings on your right-of-way south of Hampton, are there any switch or spur tracks, or anything of that sort?

A. Yes.

Q. Is there a switch or spur track south of Hampton?

A. There is a passing track switch south of Hampton.

Q. About how far is that?

A. About two thousand feet.

Q. Is there another one beyond that, south?

A. No, sir, there is no spur track, no switch.

Q. Are there any crossings?

A. Yes, there is a crossing north of the sand cut, and one south of the sand cut.

Q. How far is that from Hampton?

A. Well, the one north of Hampton is about 3,500 feet from the depot—6,500 feet from the depot I should say.

[fol. 229] Cross-examination.

Mr. Stassen:

Q. These rules as to line ups are issued by the Company in writing, are they not?

Mr. Stearns: What is that?

Mr. Stassen:

Q. The rules for maintainers are issued in writing by the Company, are they not?

A. Yes.

Q. And you state that these telephones are located at stations?

A. Yes.

Q. On the road.

A. Yes.

Q. It is a maintainer's duty to repair and keep in good shape signals and equipment at the various points between stations, is it not?

A. Yes.

Q. This night when you made the test you were seated upon the handcar?

A. The motor car.

Q. Did you do that more than once?

A. Yes.

Q. They made more than one test?

A. Yes.

Q. Is that the reason you testified once as to December without any question, instead of April?

A. It might have been December, or it might have been in April, I have no recollection as to the date.

Q. How far apart were these two tests made?

A. I could not tell you that.

[fol. 230] Q. Were these two tests made some weeks apart?

A. They may have been.

Q. Were you on the motor car both times?

A. Yes.

Q. Was Mr. O'Neil standing beside you, or down on the right-of-way, both times?

A. He was standing down on the back, near the pole line both times.

Q. Do you know which time Mr. O'Neil was talking about when he was on the stand?

A. I do not know.

Redirect examination.

Mr. Stearns:

Q. The first test you made you made with the wrong engine?

A. Possibly.

Mr. Stassen: Object to that as leading.

The Court: You may answer—the answer may stand.

Q. Do you know the number of the engine used when the first test was made?

Mr. Stassen: The witness has testified that he did not know either number. Object to the question as leading.

Q. Do you know the number of the engine used in the first test?

A. I do not.

Q. Do you know the number of the engine used in the second test?

A. I am not positive as to the number.

[fol. 231] Q. And Mr. Rowe, the Traveling Engineer, operated the engine?

A. Yes.

Q. Why was the second test made?

A. Because the first test was made with the wrong engine.

Cross-examination.

Mr. Stassen:

Q. Mr. Rowe was in charge both times?

A. Yes.

Q. Were these claim men there both times?

A. I think Rumple, Riley, Rowe, O'Neil and myself, I would not say whether the Airbrake man was there or not.

Q. You do not know which time the Airbrake man was there?

A. I would not say for sure, no, I know that he was there once.

Redirect examination.

Mr. Stearns:

Q. He was not with you?

A. No.

Q. He was not with O'Neil?

A. No.

Q. He was by the train?

A. Yes.

Q. You did not go down by the train you say when he was there?

A. No.

[fol. 232] Recross-examination.

Mr. Stassen:

Q. What did you test the night you were sitting on the motor car, the lights or brakes?

A. The lights.

Q. Did the Airbrake man have anything to do with the lights?

A. I do not know whether he did or not.

August Otte, being called as a witness on behalf of the defendant, was first duly sworn, and testified on direct examination as follows:

Examined by Mr. Stearns:

Q. What is your name?
A. August Otte.
Q. Where do you live?
A. Near Randolph.
Q. How far from Randolph?
A. A mile and three-quarters, around the road.
Q. Did you see the accident to Rambo?
A. I was not near the accident.
Q. Did you see the train after it came to a stop?
A. I seen it before it came to a stop and after it came to a stop.
Q. This was after the accident happened?
A. Yes.
Q. When it came to a stop, how far were you from the train?
A. About a mile and a half.
Q. Was the headlight burning?
[fol. 233] A. Yes.
Q. Was it burning bright or dim?
A. Bright.

Edward Otte, being called as a witness on behalf of the defendant, was first duly sworn, and testified on direct examination as follows:

Examination by Mr. Stearns:

Q. What is your name?
A. Edward Otte.
Q. Where do you live, Mr. Otte?
A. Near Randolph.
Q. Do you remember the night Mr. Rambo was killed?
A. I do.
Q. Did you see the accident?
A. I did not see the accident, no.
Q. Did you see the train?
A. Yes, I saw the train.
Q. Did you see the train before or after the accident?

A. Both, I seen the headlight.
Q. Did you see the train when it came to a stop?
A. After the train came to a stop I seen the headlight.
Q. Talk louder so we can all hear you.
A. I seen the headlight of the train before the train came to a stop and after it came to a stop.
Q. Was this after the accident, or do you know?
A. When I seen the light.
[fol. 234] Q. You did not see the accident at all?
A. No, I did not see the accident.
Q. You saw the train when it came to a stop and shortly before?
A. Yes.
Q. How far were you from the train when it came to a stop?
A. About a mile and a half.
Q. Did you see the headlight?
A. Yes.
Q. Was it burning?
A. Yes, sir, it was burning.
Q. Was it burning bright or dim?
A. It was burning bright.

Cross-examination.

Mr. Stassen:

Q. You say you live a mile and a half south of the place where the accident happened?
A. About.
Q. Along the right-of-way?
A. Yes.
Q. Where were you when the accident happened?
A. Just north of the buildings.
Q. What were you doing?
A. I was just unhitching a team.
Q. Is Gust Otte your father?
A. He is.
Q. What was he doing?
A. He was there with me.
Q. What first attracted your attention up the track?
[fol. 235] A. The headlight.
Q. What did you see when you looked up the track?
A. All I saw was the light.

Q. Was the train standing there at that time?
A. Not when I first noticed the headlight.
Q. The train was then moving?
A. I think it was.
Q. You say you think it was?
A. Yes.
Q. You are not positive that it was moving?
A. I am positive.
Q. What is that?
A. I am positive the train was moving when I first saw the light.
Q. How long did the train keep moving after you first saw the light?
A. I did not know.
Q. Do you know how far the train traveled after you first saw the light?
A. I could not say.
Q. Do you know how long the train stood there?
A. I could not say how long the train stood there for sure.
Q. Did you go up to the scene of the accident?
A. No, sir.
Q. Where is this curve that train goes around from the scene of the accident down to your place?
A. Well, there is a curve just north of our place.
Q. You say there is a curve just north of your place?
[fol. 236] A. Yes, there is a curve just north of our place, there is one curve.
Q. How far north?
A. Well, it begins just about at the road, at the crossing.
Q. You mean it begins right out in front of your place?
A. I think so, I would not say for sure.
Q. That is a curve for a mile and a half you say?
A. I do not think it is a mile and a half.
Q. Where did the train come to a stop?
A. About a mile and a half from our place.
Q. Can you fix it any closer than that?

Mr. Sterns: O, if it is a mile and a half that is pretty close, is it not?

Q. Do you know where it stopped in relation to the curve?
A. It stopped beyond the curve a little ways, I think.
Q. A little ways down on the curve?
A. I was not up at the scene of the accident.

Q. What time was this?
A. You mean when I first noticed the light?
Q. Yes.
A. It was a little after five.
Q. And you say the train was down on the curve a ways when it stopped?
A. Not on our curve, not the curve by our place.

MRS. H. B. THIES, being called as a witness on behalf of the defendant, was first duly sworn, and testified on direct examination as follows:

[fol. 237] Examination by Mr. Stearns:

Q. What is your name?
A. Mrs. H. B. Thies.
Q. Where do you live?
A. Hampton.
Q. Did you know Mr. Rambo?
A. I knew of him.
Q. Do you recall the day he was killed, December 8, 1933?
A. I do.
Q. Did you see him at all that day?
A. Just to speak to him.
Q. Where did you see him?
A. Right out in front of the store.
Q. About what time of day was that, Mrs. Thies?
A. I should judge about five minutes of five, or thereabouts.
Q. Where is your store with reference to the Great Western railroad track?
A. It is east of the Great Western railroad track.
Q. About how far?
A. I do not know, just across the road.

URBAN HORICH, being called as a witness on behalf of the defendant, was first duly sworn, and testified on direct examination as follows:

Examination by Mr. Stearns:

Q. What is your name?
A. Urban Horich.

[fol. 238] Q. Where do you live?
A. In Hampton.
Q. Did you know R. C. Rambo?
A. I did.
Q. What is your business?
A. I work in the elevator.
Q. Did you see Mr. Rambo on December 8, 1933, the day he was killed?
A. I did.
Q. Where?
A. Setting his handcar off in the morning.
Q. Did you see him after that time?
A. Yes, I did.
Q. Where did you see him?
A. In the hotel.
Q. Where in the hotel?
A. Well, he was up at the bar having a sandwich.
Q. What time was that?
A. I should judge about ten minutes to four, or something like that.

Cross-examination.

Mr. Stassen:

Q. You did not pay any particular attention to the time, did you?

A. I did not, no, sir, I could not say the exact time.
Q. This place you refer to is where Ray Holzemer works?
A. Yes.
Q. Is he the one who served him a sandwich?
A. Yes, sir.

[fol. 239] Theodore Savelkoul, being called as a witness on behalf of the defendant, was first duly sworn, and testified on direct examination as follows:

Examination by Mr. Stearns:

Q. What is your name?
A. Theodore Savelkoul.
Q. Where do you live?
A. Minneapolis.
Q. By whom are you employed?

A. By the Chicago Great Western Railroad Company.

Q. What is your occupation with the Chicago Great Western?

A. I am a brakeman.

Q. Were you on No. 504 on the day Rambo was killed?

A. Train 8, with Engine 504.

Q. Yes, that is what I mean to say.

A. Yes, sir, I was on that.

Q. What cars were in that train that day?

A. Tere were four cars.

Q. Do you know the numbers of those cars?

A. No, I do not know the numbers.

Q. Will you describe them?

A. There was a combination mail and baggage car, a straight baggage car, combination coach and smoker, and a combination sleeper and buffet car, or diner as we call it.

Q. As you left Rich Valley that day, coming toward Empire, how fast were you traveling from Rich Valley going south?

[fol. 240] A. Probably forty miles an hour to Hampton, or the point of the accident.

Q. First, up to Hampton do you know approximately how fast you were traveling?

A. I imagine we were running between forty, forty-five and fifty.

Q. From Hampton how fast were you going?

A. After we got over the hill I should judge sixty miles an hour.

Q. Did you see the accident, Mr. Savelkoul?

A. Well, no, I did not see the accident, I was in the coach.

Q. Where were you in the coach?

A. In the first class end of this coach.

Q. Did you feel the emergency brake applied?

A. Yes.

Q. Do you know where it was applied?

A. Not exactly, no. It must have been applied a little before he hit the motor car.

Mr. Stassen: I move to strike that out.

Mr. Stearns:

Q. Do not tell unless you know. Did you feel any effect of hitting the car?

A. No.

Q. Do you know where the accident happened?
A. No, I did not feel any effect of hitting the car.
Q. You did not take any measurements to see within what distance the train stopped or anything of that sort?
A. No.

The Court: The jurors will be excused at this time until ten o'clock tomorrow morning.

[fol. 241] (Jurors leave court room.)

Mr. Stearns: Due to this being an advanced argument I will not make the motion at this time.
Argument.

* * * * * * *

Court adjourned at this time until May 25, 1934, at ten o'clock.

May 25, 1934.

Ten o'clock session, pursuant to adjournment.
All parties present.

P. A. Brown, being called as a witness on behalf of the defendant, was first duly sworn, and testified on direct examination as follows:

Examination by Mr. Stearns:

Q. What is your name?
A. P. A. Brown.
Q. Where do you live?
A. St. Paul.
Q. By whom are you employed?
A. Chicago Great Western Railroad Company.
Q. In what capacity are you employed?
A. Train Dispatcher.
Q. How long have you been a Train Dispatcher?
A. I have been in the Dispatching Department for twenty-one years.
Q. What is meant by Train Dispatcher?
A. There are three different tricks, one man is assigned to each trick to handle a record of movements of trains over his district.
[fol. 242] Q. Were you a Train Dispatcher for the Great Western on the eighth day of December, 1933?

A. Yes.

Q. Where were you located at that time?

A. St. Paul.

Q. What time did you go on duty on that day?

A. I went on duty at four o'clock P. M.

Q. What time was No. 8 due at Hampton on the eighth day of December, 1933?

A. 4:12 P. M.

Q. Was that train late that day?

A. It was late at Hampton, yes.

Q. What time did that train go through Hampton that day?

A. 5:05.

Q. From whom do signal men get line ups?

A. From the Train Dispatcher.

Q. Have you a telephone that connects from your office with the various station agents?

A. Yes.

Q. On December 8, 1933, did you have a telephone connected with the Hampton office?

A. Yes.

Q. Was that telephone working?

A. Yes.

Q. Was it working at all times on that day?

A. It was all O. K.

Q. How do signal men get line ups from the Dispatcher?

A. He comes in on the phone and announces the point where he is.

Q. That phone is so regulated that you do not have to call central?

[fol. 243] A. No.

Q. They merely pick up the receiver and talk to the Dispatcher?

A. Yes.

Q. On December 8, 1933, did you know Rambo?

A. I knew him, yes.

Q. Did he get a line up from you that day?

A. No, sir.

Q. At no time?

A. No, sir.

Q. Now, Mr. Brown, what was the number of the engine on No. 8 Train?

A. 504.

Q. On December 8, 1933?

A. Yes.

Q. What cars were attached to that train?

A. Mail car No. 66, baggage car No. 37, coach No. 280, combination observation and sleeper, Woodhill Club, all steel cars.

Q. Those were the only cars in the train?

A. Yes.

Cross-examination.

Mr. Stassen:

Q. You say you went on duty at four o'clock that afternoon of December 8, 1933?

A. It might have been a few minutes before that.

Q. That is the time you are supposed to go on duty?

A. That is the assigned hour, yes.

Q. So you had nothing to do with sending out the 7:50 [fol. 244] line up in the morning that day, or the 12:50 line up that noon?

A. No, sir.

Q. In other words, after you went on duty, you sent out no regular line up?

A. I sent out no regular line up, no, sir.

Q. Do you keep a record of when the various maintainers call in for line ups?

A. No.

Q. Or any information during the day?

A. No, sir.

Q. You have no record of that?

A. No, sir.

Q. How great a distance do you cover?

A. 180 miles by telephone.

Q. If any section men call in for any information, do you keep any record of that?

A. No, sir.

Q. The Dispatcher, I suppose, does keep a record, however, of regular line ups that go out twice a day?

A. Yes.

Q. Did the conductor on No. 8 call you from Rich Valley that day?

A. Yes.

Q. Have you any record of that call?

A. No, I have not, just a notation on the train pad.

Q. What kind of a notation, you can read that (indicating).

A. "At 4:05 P. M. No. 8 hit a truck one-fourth mile east of Rich Valley, killing two men, at small private crossing [fol. 245] near farm house. Truck was approaching from fireman's side. The corner at Hastings notified and arrived at Rich Valley at 4:45 P. M."

Q. Is that the only notation you have regarding talking with the conductor?

A. I talked to the conductor later at Hampton. That is the only one as to Rich Valley.

Q. You have no record of the directions given the conductor at Rich Valley?

A. The instructions given——

Q. Just a minute. Answer the question.

A. No, no record.

Q. And you have no record as to what time he received this final instruction at Rich Valley?

A. No.

Q. Do you have any record of what messages were sent Empire and Hampton that day?

A. No.

Q. Do you rememebr any calls in to you that day by maintainers?

A. The maintainer from Empire, Mr. Eckstrom, called in two or three times during the day.

Q. Do you remember any other calls?

A. No, sir.

Q. That is the only one, the only maintainer you recall calling?

A. Yes.

Q. You say you have 180 miles of track?

A. Telephone communication, yes.

[fol. 246] Redirect examination.

Mr. Stearns:

Q. This train sheet shows the numbers of trains?

A. Yes.

Q. That is when they arrive and leave the various stations?

A. Where stations are open, yes.

Q. What time did No. 8 leave Rich Valley on December 8, 1933?

A. That is a closed station, we have no record of it.

Q. Do you know when it arrived at Empire?

A. Yes.

Q. What time?

A. 5 P. M.

Q. Is it any part of your duty to locate signal maintainers?

A. No, sir.

* * * * * * *

Recross-examination.

Mr. Stassen:

Q. Do you know how many maintainers are on this 180 mile stretch?

A. Not exactly, but I can give you close to it.

Q. Give us your best judgment.

A. Twelve.

PETER GRAMLING, being called as a witnes on behalf of the defendant, testified as follows:

[fol. 247] Examined by Mr. Stearns:

Q. Mr. Gramling, when you left Minneapolis with Train No. 8 on December 8, 1933, what condition were the brakes in?

A. The brakes were O. K.

Q. Now please talk loud. What kind of brakes are they?

A. Automatic brakes.

Q. What are they known as, are they airbrakes?

A. Airbrakes.

Q. Now, you testified, Mr. Gramling, as I recall the evidence, that when you first saw an object ahead of you, you thought that object was eight or nine car lengths from you?

A. Yes.

Q. At that time how fast was your train moving?

A. About sixty miles an hour.

Q. Were you timing yourself in any manner?

A. No, sir.

Q. Were you doing anything which would give you accurate information as to how far that object was from you?

Mr. Stassen: Object to that as leading.
The Court: You may answer.

A. I was just looking straight ahead.
Q. Were you looking straight ahead at all times?
A. Yes.
Q. Is this statement you made, "eight or nine car lengths ahead of you", merely a guess?

Mr. Stassen: Object to that as leading.
[fol. 248] The Court: Sustained.
Mr. Stassen: And further object to it as not being a proper statement of his testimony.
Mr. Stearns: What did he say?
Mr. Stassen: Seven, eight or nine.

Mr. Stearns:

Q. Well, "seven, eight or nine car lengths ahead of you."
A. Yes.
Q. Are you in a position, Mr. Gramling, to tell us, we want to know the facts, how far that object was from you when you first saw it?

Mr. Stassen: Objected to as leading the witness.
The Court: You may answer.

(Question read by reporter.)

A. Well, it might have been eight, nine, or ten car lengths, it might have been a thousand feet or more, or it might have been a little bit less.
Q. Now, from the time that you hit Mr. Rambo, until you got to Oelwein and turned the engine into the roundhouse, did you in any manner interfere with the headlight?
A. No, sir.

Defendant's Exhibit 10 marked for the purpose of identification.

Q. Showing you Defendant's Exhibit 10, I will ask you what that is, Mr. Gramling?
A. That is a work report that we make on arrival.
Q. When was that work report made out?
A. At Oelwein, Iowa.

Q. By whom?

[fol. 249] A. By myself.

Q. What is the work report, what does it mean?

A. Work for the mechanic to do, the work reported.

Q. To repair the engine?

A. Yes, to repair the engine.

Mr. Stearns: We offer Defendant's Exhibit 10 in evidence.

Mr. Stassen: Objected to as incompetent, immaterial, and no foundation laid.

The Court: Received.

Q. Does that work report contain the work you desire to be done on the engine?

A. Yes.

Q. Now, Mr. Gramling, from the time you hit Rambo, until the time you got to Oelwein, Iowa, was the headlight on No. 504 repaired, altered, or changed at all?

A. No, sir.

Q. Was it repaired, altered, or changed from the time it left Minneapolis until it got to Oelwein?

A. No, sir.

Cross-examination.

Mr. Stassen:

Q. On direct examination, Mr. Gramling, when I called you as my witness, you testified that when you first saw an object ahead of you, which you thought looked like a couple of dogs, that it was seven, eight, or nine car lengths away, is that correct?

A. Yes.

[fol. 250] Q. And at the time of the inquest in this matter, on the eighteenth day of December, 1933, about ten days after the accident, you testified, did you not, with reference to the second accident, that the first thing you noticed was something on the track, which you figured was a couple of dogs running down the line?

A. Yes.

Q. And then you testified that this object was about seven or eight car lengths away at that time?

A. Well, it is hard judging——

Q. Did you testify at that inquest that that object was about seven or eight car lengths away at that time?

A. I think I did.

Q. And did you then testify that as you came closer to this object you then saw it was a speeder?

A. A speeder.

Q. With a man on it?

A. Yes.

Q. And you then testified that when you saw it was a speeder you were five or six car lengths away?

A. Well——

Q. Did you testify that way, Mr. Gramling, at the inquest?

A. I do not remember whether I did or not.

Q. Do you remember being asked: "How close were you to it when you saw it was a speeder" and your answer, "About six car lengths away"?

A. I said six or seven or more.

Q. When you saw it was a speeder?

[fol. 251] A. Yes, sir.

Q. And were you then asked the following question: "Was that about six car lengths away?" And your answer: "About five or six." Did you answer that question that way at the inquest?

Mr. Stearns: I admit anything in that transcript he did answer.

Mr. Stassen: You admit that?

Mr. Stearns: Yes, I do not think there is any question about the transcript.

Mr. Ryan: Does he admit it?

Mr. Stearns: Well, if I admit it, he admits it, doesn't he?

Mr. Ryan: We do not know.

Mr. Stearns: Well, learn something about it.

Mr. Stassen:

Q. Do you remember being asked: "Q. When you had closed in a matter of probably two, probably four car lengths?" and your answer: "Yes. Q. When you saw it was a speeder? A. A speeder."

A. When I closed in on him.

Q. When you closed in on the object to a point where you saw it was a speeder. When you closed in a matter of two to four car lengths from what you first saw. You testified that way, didn't you?

A. I do not think so, no, sir.

Q. On direct examination?

Mr. Stearns: What page are you on?

Mr. Stassen:

Q. Day before yesterday, when you were my witness, you testified that when you recognized it to be a speeder with a man on it, it was five or six car lengths ahead?

[fol. 252] A. I probably did.

Q. Now, who did you talk to between the time you were on the stand before and now, that caused you now to say that it might have been a thousand feet ahead?

A. I was talking to the Claim Agent, and I asked him what statement I made.

Q. You talked to him between the time you were on the stand before and this morning?

A. Yes, I wanted to see the statement I made.

Q. Now this matter of the cylinder cock, what is the effect of the cylinder cock being knocked off?

A. It blows out steam, throws up sand, dirt and dust.

Q. It blows out the steam?

A. Yes.

Q. Does that make it difficult to keep up steam?

A. No, it does not amount to anything, it makes a lot of dust, throws sand over the machinery.

Q. What was your steam pressure at Rich Valley?

A. What?

Q. What was your steam pressure at Rich Valley?

A. It might have been 180 pounds, that is why she might have been.

Q. You do not know exactly?

A. No, sir, I do not watch the gauge so close that I could tell every turn of the wheel what the gauge read.

Q. You do not know the steam pressure when you went through Hampton?

[fol. 253] A. No.

Q. Or Randolph or Oelwein?

A. No, sir.

Redirect examination.

Mr. Stearns:

Q. Now, Mr. Gramling, at the coroner's inquest the gentleman who asked you the first statement, asking you

how the accident happened in question form was Mr. Stassen, the attorney trying this lawsuit?

A. Yes.

Q. And as part of your duty when an accident happens you may state whether or not you have to give the Claim Department of the Railroad Company the facts.

A. Yes.

Q. Did you give Mr. Rumple a statement of the facts?

A. Yes.

Q. How long after the accident?

A. It might have been a day or two.

Q. Now you said you talked with Mr. Rumple, I believe, last night, and you talked to me too?

A. Yes.

Q. And I called your attention to the original statement you gave the Railroad Company after the accident, did I not?

A. Yes.

Q. And I called your attention to the fact that it was my recollection that you said when you first saw an object on the track——

[fol. 254] Mr. Stassen: Objected to as leading.

The Court: Sustained.

Mr. Stearns: Exception. An unfair inference. Well, all right.

Mr. Stassen: Ask him what you called his attention to.

Defendant's Exhibit 11 and 11-A marked for the purpose of identification.

Q. Now, before the accident to Mr. Rambo, and when you say you saw an object on the track, did you have any instrument that would tell you the distance you were from the object?

A. No.

Q. Did you make any test of the headlight yourself, to see how far you could see an object, after the accident happened?

A. No, sir.

Q. Did you make any test of the headlight before the accident happened?

A. No, sir.

Q. Showing you Defendant's Exhibit 11, I will ask you what that is, please read it.

A. "Chicago Great Western——"

The Court: Read it to yourself.

(Witness reads statement to himself.)

Mr. Stearns:

Q. Is that the statement you gave Mr. Rumple?

A. Yes, sir.

Q. On December 10, 1933?

A. Yes.

Q. At that time, did you tell Mr. Rumple that when you were about one thousand feet——

[fol. 255] Mr. Stassen: Now, just a moment. We object to that as leading the witness, immaterial and incompetent.

The Court: Overruled.

Q. At that time did you tell Mr. Rumple that when you first saw the object on the track that you were about one thousand feet from the car?

A. Yes.

Mr. Stassen: Object to counsel leading the witness, object to that as not the best evidence, no foundation laid, and immaterial.

Mr. Stearns: Offer in evidence Defendant's Exhibits 11 and 11-A.

Mr. Stassen: May I see them?

(No answer.)

Mr. Stassen: I request an instruction by the Court that I be permitted to inspect the documents.

Mr. Stearns: O, here, you may read the whole thing.

Mr. Stassen: Thanks.

Recross-examination.

Mr. Stassen:

Q. Who wrote this out?

A. Mr. Rumple wrote it, but I dictated it.

Q. And he is the Claim Agent?

A. Yes.

Mr. Stassen: Objected to as immaterial, incompetent, no proper foundation laid, and irrelevant.

Mr. Stearns: All right.

The Court: Are you withdrawing the offer?

Mr. Stearns: I want the Court to rule on it, of course.

[fol. 256] The Court: Received.

Mr. Stassen:

Q. You say on this run you did not make any test of the headlight?

A. No, sir, it was O. K. when we left Minneapolis.

Q. Did you see anybody else make any test of the headlight along the road any place?

A. No, sir.

Redirect examination.

Mr. Stearns:

Q. Do you know Mr. Miller, the head electrician?

A. Yes.

Q. Where were you after the accident?

A. Down on the ground.

Q. Where?

A. Down on the ground alongside the engine.

Q. And did you see Miller there at that time?

A. Yes.

Q. Did you see him at Rich Valley?

A. Yes.

Q. Was he on the train at that time?

A. He was on the train at that time.

Q. When you leave Minneapolis is it any part of your duty to examine the headlight?

A. The roundhouse man does that.

Q. He is the electrician?

A. Yes.

A. K. Rowe, being called as a witness on behalf of the [fol. 257] defendant, was first duly sworn and testified on direct examination as follows:

Examination by Mr. Stearns:

Q. What is your name?

A. A. K. Rowe.

Q. Mr. Rowe, where do you live?
A. St. Paul.
Q. What is your business?
A. Traveling Engineer.
Q. By whom are you employed?
A. Chicago Great Western Railroad Company.
Q. How long have you been in its employ?
A. Since '97.
Q. How long have you been Traveling Engineer?
A. About twelve years.
Q. What is meant by a Traveling Engineer?
A. Well, it takes in quite a few duties. I am in charge of the engine men on the district or the division, that is, the work performed, and we promote them and instruct them.
Q. Will you kindly speak louder.
A. We instruct them, ride with them, and watch the full performance of the handling of trains.
Q. Can you operate a train?
A. What is that?
Q. Can you operate a train?
A. Yes.
Q. Are you familiar with parts of locomotives and the likes?
A. Yes.
[fol. 258] Q. Do you know Engine 504?
A. Yes.
Q. Did you hear Mr. Brown's testimony as to what cars were on Train No. 8 on the eighth day of December, 1933?
A. Yes.
Q. Do you recall coming down in the vicinity of Hampton with Engine No. 504 and those cars to make a test?
A. An airbrake test, yes.
Q. Will you just describe what test you made?
A. How it was done you mean?
Q. Who operated the engine?
A. Gramling was on the seat, and I was standing beside him.
Q. What did you do?
A. He estimated the speed at the time of the accident to be sixty miles an hour, which is the average speed of any passenger train, I would say, in that district, that piece of track.

Q. Now, when the train arrived at a speed of approximately sixty miles an hour, what was done then?

A. We went through the same performance as he did the night of the accident.

Q. Did he apply the emergency?

A. We went to emergency with the brake valve.

Q. What did you mark in the track when the emergency was applied?

A. We had a man standing with a flag just to the right of the westerly rail.

Q. Was the train going sixty miles an hour when your train got to the man with the flag?

[fol. 259] A. As we estimated it, yes.

Q. After you got to the man with the flag, was the emergency brake applied?

A. Yes.

Q. Then how far did that train go before it stopped?

A. 2210 feet.

Q. Now where did the man who had the flag stand?

A. Where the emergency application was made?

Q. Yes.

A. Just west of the westerly rail.

Q. Was it north or south of Hampton?

A. It was south of Hampton.

Q. About how far south?

A. About two and a half miles out of there.

Q. Who was with you at the time the test was made?

A. Engineer Gramling.

Q. Was Carlton with you?

A. And the Westinghouse Airbrake Efficiency man, Mr. Carlton.

Q. He was with the engine?

A. Yes.

Q. Did you make another test?

A. Yes.

Q. How long afterwards was that test made? Describe what you did.

A. We made the first test, and then we backed up to Hampton, or westerly switch, so as to get the speed back and made a second test.

[fol. 260] Q. Where did the man with the flag stand at the time of the second test?

A. Well, we had two flags in this movement. The first one was one-half mile west of where the accident happened. The reason for that was we clocked it with stop watches, both on the ground and in the engine, Carlton handling the clock in the engine to verify our judgment as to speed, and as we passed the first flag——

Q. As you passed the first flag, how fast were you going?

A. We estimated it at sixty miles an hour. The man with the flag dropped it, giving signal to those holding the watch at point of accident one-half mile east. It gave these men at the point of accident a signal to clock their watch so as to have a duplicate check on the time consumed making this half-mile movement.

Q. Was Carlton in the engine at that time?

A. Yes.

Q. And when you got to the first flag man, did you apply your emergency?

A. No, sir.

Q. Did you apply the emergency brakes at all in the second test?

A. Yes, when we traveled one-half mile.

Q. And how far did you travel after applying your emergency in this second test?

A. 2,170 feet.

Q. You had, as I understand it, nothing to do with the headlight test testified to yesterday?

A. I did later.

[fol. 261] Q. Do you recall the first headlight test, what engine was used?

A. We had a test on this engine's headlight the following night, after the airbrake test.

Q. After the airbrake test?

A. Yes.

Q. Who was present at that test?

A. Miller was on the engine.

Q. What I am getting at is: One of the witnesses testified that a test was made in December where a different engine was used. Do you know anything about that?

A. Yes, we made the test then.

Q. What engine was used?

A. No. 930.

Q. Now, have you heard the testimony in this case from Gramling and Groth, from Gramling as to how he operated

the train up to the time he struck Rambo, and from Groth as to elevation of the tracks or decline?

A. Yes.

Q. Assuming that testimony to be true, with a train going sixty miles an hour, and the emergency brake applied on that track, can you form an opinion as to within what distance this Train No. 8 could stop?

Mr. Stassen: Objected to as no proper foundation laid.

Mr. Stearns: I will withdraw that.

The Court: You may answer, to save time.

A. We made——

The Court:

[fol. 262] Q. Can you give an opinion, yes or no?

Mr. Stearns:

Q. Have you an opinion as to what distance it could stop in?

A. Without measuring it?

Q. Well, I will put it this way: When the emergency was applied to this Engine No. 504 at the time you made the test, did that mean that nothing further could be done to stop that train?

A. Absolutely.

Q. And your first test showed, after the emergency was applied, 2,210 feet and the second test 2,170 feet?

A. Yes.

Cross-examination.

Mr. Stassen:

Q. As I understand it, you were also along when the headlight test was made?

A. Yes.

Q. Where was the locomotive stopped at that time?

A. At the westerly point of the accident.

Q. How far west of the accident?

A. The engine was stopped, as measured afterwards, at 810 feet, but we were going down—in fact, we made two stops on the safety proposition. They had a man down there on a speeder, and it was 12:10 in the morning and we

had a flag up one-half mile west of the point where this man was on the speeder, and we went at a slow speed until we could distinguish this object as to what it was, and we prob-
[fol. 263] ably were going ten miles an hour, not over that.

Q. Did you make a stop then by that under ground crossing, that slow stop?

A. You mean the first stop?

Q. The first stop.

A. No, sir, it was back further than that, we were up about one-half mile from there.

Q. About one-half mile from where this man was on the speeder?

A. Yes, sir, it was a good half mile.

Q. Then you moved more slowly you say to within 810 feet?

A. That is the distance the engine was from that point when we measured it afterwards.

Q. Who else was along with you at that time?

A. Miller, Riley and Rumble, I think that was all, the engineer and fireman.

Q. Is that when Waltz was on the speeder, do you know?

A. Yes, that is right, we had Waltz on the speeder and the speeder was on the rail.

Q. And O'Neil was down there by the side of the track?

A. There was somebody down there with them, I did not meet Mr. O'Neil.

Q. Did you make two tests with the headlights?

A. Yes, sir.

Q. When did you make this test we were just talking about?

A. On the twentieth of April, 1934.

Q. When did you make the first test?

[fol. 264] A. Shortly after the accident, I think it was the twelfth day of December, 1933.

Q. And what engine did you have on the twelfth of December?

A. We had Engine No. 930.

Q. Is that an engine of the same type?

A. No, sir, it is not. It is passenger equipment, but a larger engine.

Q. Does it have the same headlight?

A. Yes.

Q. And on that occasion was Waltz on the track with the speeder?

A. Yes.

Q. How far away did you stop at that time?

A. Eleven hundred six feet.

Q. Seven hundred six feet?

A. Eleven hundred six feet.

Q. That is when you made your final stop?

A. Yes.

Q. And both times you stopped when you could clearly distinguish the object as a man?

A. We started to make the stop, not an emergency stop, but a service stop, we drifted along the rail making the stop.

Q. But you brought your train to a complete stop and measured the point from where you could clearly see the man on the speeder?

A. We go within range quite a little, half an engine length maybe.

Q. Within the range of half an engine length?

A. Within the range of half an engine length, it took that distance to bring the train to a stop, using the service application brake.

[fol. 265] Q. So when Engine No. 930 was used, it was eleven hundred and six feet, and with Engine 504 it was eight hundred ten feet, is that correct?

A. About, allowing in both cases for the engine distance we ran after we picked it up.

Q. You made an allowance both times you say?

A. No, sir, I say we should allow for it. We were within the range, we did not back up, we made the stop and marked it.

Q. In measuring, did you make that allowance?

A. No, we measured the actual stop.

Q. The actual point?

A. Yes.

Q. Was Engineer Gramling on the engine the night you had Engine 930?

A. No, sir, he was not.

Q. You had a different engineer that night?

A. Yes, we had a different train.

Q. Well, did you make some brake tests with Engine No. 930 that night?

A. No, sir.

Q. Did you make brake tests on more than one night?

A. Well, yes, but not with Train No. 2.

Q. When did you make the other brake test?

Mr. Stearns: Objected to as immaterial, the reason for this second test was that they had the wrong engine, the wrong train.

Mr. Stassen: Would you mind letting the witness testify?

Mr. Stearns: Well, go ahead, you can testify.

Q. When did you make the other brake test?

[fol. 266] A. Well, I cannot give you the date on that, but I can give you the circumstance that led up to it.

Q. Can you give me the approximate date?

A. No, I do not believe I could. We threw it out and I did not pay any attention to it.

Q. You were down there?

A. Yes, sir, I was down there.

Q. And the Westinghouse Airbrake man was there?

A. Yes, sir.

The Court: Is that the date you had the wrong engine?

A. Yes, sir, we had the wrong engine, the wrong train, and an extra car. So when I submitted it to them they did not want it and it was no good to them.

Mr. Stassen:

Q. What train did you have?

A. We had Train No. 8.

Q. Did you have Engine 504?

A. 508.

Q. You had Engine No. 508 that day?

A. An engine of the same class, but not the same number.

Q. The same type of engine?

A. Yes, the same type of engine, and we also had another car and that was not right.

Q. When were these two tests made with Engine 504?

A. On the nineteenth day of April.

Q. Was the Westinghouse Airbrake man there then?

[fol. 267] A. Yes, he was on the engine in both cases.

Q. You say on the second test by flag posts of one-half mile you checked to see whether you were going sixty miles an hour?

A. Yes.

Q. There is no speedometer on the locomotive?

A. No.

Q. Do you know what that check showed as to a lapse of time when you traveled that half mile?

A. Twenty-nine and two-fifths seconds.

Q. Which would mean that you were going a fraction over sixty miles an hour?

A. Sixty-one to a point.

Q. Sixty-one miles an hour on an average of that half mile?

A. Yes, as the brakes were applied.

Q. The brakes were applied at the place of this second flag as you traveled that half mile averaging sixty miles an hour?

A. Yes.

Q. From that second flag to a point where the engine came to a complete stop was 2,170 feet?

A. Yes, that is the second test.

Q. And prior to reaching the man at the place of the second flag nothing was done with the brake lever or any braking device?

A. No, sir.

Q. And on the first occasion, when the first test was made that night, you estimated your speed at sixty miles an hour, you had just the one flag?

A. Yes, at point of application.

Q. What was that?

[fol. 268] A. Yes, at point of application.

Q. You estimated, as you reached that flag, you were going sixty miles an hour?

A. Yes.

Q. And then as you reached the flag, the brake was applied?

A. Yes.

Q. Before that nothing was done to the brake or any other device?

A. No.

Q. And from that flag on the first test to where the locomotive finally came to a stop was 2,210 feet?

A. Yes, 2,210 feet.

Q. On both these two stops you had the same locomotive and the same cars that were on No. 8 train the night Rambo was killed?

A. Yes, the test was made within a space of twenty minutes, I think the exact time within which the test was made, was nineteen minutes.

Q. Who measured the distance?

A. Rumple and Riley, and I met them part way and checked along with them.

Q. What measuring device did they use?

A. One hundred foot Engineer's steel tape.

Q. Rumple and Riley *and* two of your claim men, aren't they?

A. Yes, sir.

Q. You say you met them part way and they were using a steel tape?

A. Yes.

Q. So your testimony as to total distance is based upon what they told you.

[fol. 269] A. I did not say that. They marked the ties at each tape length and marked the rail—they marked the rail on the outside and the tie on the inside.

Q. Well, then, your testimony is based upon what marks they put on the rail?

A. I counted the marks going back and giving them to Carlton, the Westinghouse Airbrake man.

Q. Then you met them part way and then went back the entire distance?

A. I met them part way, and we walked back to the automobile, which was at the point of the accident, going back I counted the marks on the ties.

Q. Was this after the first or second test?

A. This was after the second test.

Q. You did not count the ties or rails?

A. No.

Q. What is the length of a steel rail?

A. Standard rail is thirty-three feet.

Q. In your opinion how fast was that locomotive in the second test going five hundred feet before it came to a complete stop?

A. Five hundred feet before it came to a stop?

Q. In your opinion, how fast was that locomotive going in the second test in the five hundred feet before it came to a complete stop?

A. Well, that would be only a guess, and I do not think that would be any good. If you travel——

Q. Do you know? Can you form an opinion as to that?
A. Five hundred feet from the stop?
[fol. 270] Q. Yes.
A. I imagine twenty-five miles an hour—thirty.
Q. Did you have any other clocks or flags along the road as you were stopping?
A. No, none.
Q. You had no timing device or speedometer of any kind?
A. No, none.
Q. Mr. Rowe, has your company a rule as to speed of passenger locomotives upon the rail?
A. Yes.
Q. What is that rule?
Mr. Stearns: Is it in writing?
A. It is in the time card.

Mr. Stearns: Objected to as incompetent, no foundation laid and not the best evidence.
The Court: Sustained.

Q. Have you a copy of that rule here?
A. Yes.
Q. Will you produce it?

(Witness produces rule.)

Q. What district is Hampton and Randolph on?
A. Tenth District.

Mr. Stearns: You better find out if that was in effect on December 8, 1933, before you introduce it.

Q. Do you know whether or not there had been any change in this rule since December 8, 1933 affecting the district between Hampton and Randolph?
A. There has been no change, no.

[fol. 271] Mr. Stearns:

Q. Was that rule that was in effect December 8, 1933, in writing?
A. It was in the time card, special instructions.

Mr. Stearns: Objected to as not the best evidence.
Mr. Stassen: There is no question.
The Court: Sustained.
Mr. Ryan: We have not offered anything yet.

Plaintiff's Exhibit 8 marked for the purpose of identification.

Q. Calling your attention to Plaintiff's Exhibit 8, portion under tenth district, is that the rule that was in effect as to speed of passenger locomotives between Hampton and Randolph on the eighth day of December, 1933?

Mr. Stearns: Just a moment.

Q. Was the rule in effect December 8, 1933, governing speed of locomotives in writing?

A. The only writing we got is in the time card table.

Q. It is in writing—printed?

A. Yes.

Mr. Stearns: Objected to as incompetent, not the best evidence.

The Court: Sustained.

Q. Have you a copy of the time tables that was in effect December 8, 1933?

A. No, sir, not with me.

Mr. Stassen: Are you willing to produce one of those, Mr. Stearns?

Mr. Stearns: I haven't any. I am going to finish this case as fast as I can.

[fol. 272] Q. Mr. Rowe, on December 8, 1933, was the maximum speed permitted by your passenger locomotives between Hampton and Randolph sixty miles an hour?

A. Yes.

Q. On December 8, 1933, what was the maximum speed permitted by your railroad for the operation of passenger locomotives without pilots?

Mr. Stearns: That is objected to as incompetent, irrelevant and immaterial, and not the best evidence.

The Court: Sustained.

Q. On December 8, 1933, between Hampton and Randolph was the maximum speed that a passenger locomotive could be operated without a pilot fifteen miles an hour?

Mr. Stearns: Counsel, the Court has already told you that that is going to be taken out of the case. I think it is unfair to inject that pilot into this case. I object to it as incompetent, irrelevant and immaterial, and not the best evidence.

Mr. Ryan: Talking about rules.
Mr. Stearns: The pilot is not in this case.
The Court: You may answer.
Mr. Stearns: May I ask a question?
The Court: You may.

Mr. Stearns:

Q. Was there a rule on December 8, 1933, governing the operation of engines without pilots in the vicinity of Hampton in writing?
A. No, sir.

The Court: He may answer.

[fol. 273] (Question read by reporter.)
A. No.

Mr. Stassen:

Q. You say yes and no?
A. The question was, whether there was a rule restricting the speed to fifteen miles an hour and I say, "no".
Q. Was there a rule restricting the speed below the speed allowed under the other rule, if running without a pilot?

Mr. Stearns: That is objected to as a double question, incompetent, irrelevant and immaterial, and no sufficient foundation laid.
The Court: You may answer.
A. No.

Redirect examination.

Mr. Stearns:

Q. So that there will be no question about it, Mr. Rowe, one test you made with the passenger train stopped near Hampton, and that was not 504?
A. Yes.
Q. And you were instructed then to make a test with No. 504 and the same cars involved in this accident?
A. Right.
Q. So the figures you gave of 2,210 feet and 2,170 feet are with No. 504 and the same cars involved in the accident?
A. The same equipment.

[fol. 274] LEROY M. CARLTON, being called as a witness on behalf of the defendant, was first duly sworn, and testified on direct examination as follows:

Q. What is your name?
A. Leroy M. Carlton.
Q. Where do you live?
A. Glenn Ellen, Illinois.
Q. What is your occupation?
A. Mechanical Expert for the Westinghouse Airbrake Company.
Q. How long have you been so employed?
A. Twenty-seven years.
Q. In that same occupation?
A. Same occupation.
Q. Are you familiar with the different classifications of locomotives?
A. On different railroads?
Q. Yes.
A. Yes.
Q. Are you familiar with the five hundred type locomotive on the Great Western?
A. I am.
Q. Do you know how to operate airbrakes?
A. Yes.
Q. Do you know how to operate an engine?
A. Yes.
Q. Have you in the past made tests on various engines as to how airbrakes operate?
A. Yes.
Q. Have you made tests on various locomotives in the past as to the operation of locomotives as to speed?
[fol. 275] A. With trains?
Q. Yes.
A. Yes.
Q. Did you make a test of No. 504 and some cars attached to it at any time for the Great Western?
A. Yes.
Q. When was that test made?
A. April 19.
Q. Was that the test Mr. Rowe just testified about?
A. Where they made the two tests on one day?
Q. Yes.
A. Yes.

Q. Where was that test made?

A. Between Hampton and Randolph.

Q. Will you describe what airbrakes are?

A. I can make an extensive explanation.

Q. Give us as simple an explanation as you can.

A. Airbrakes are operated with compressed air, and this air, when under pressure, is able, when it is free, to go in any direction, to expand and do work. Now, there is a brake cylinder on every vehicle, some of them have two brake cylinder locomotives, some three, one on the driver brake and one on the truck. There is one brake cylinder on most every car, and sometimes on these cars there are two brake cylinders. Now, attached to the brake cylinder levers—these brake cylinder levers are connected by rods, and by another rod to other levers on the trucks. I might [fol. 276] say the brake cylinder is atttached to the car body. Then the levers are out sideways, and the rods are connected to the lever on each truck, and the bottom rods to the other levers. These levers are connected to the brake beams that are hung to the truck frame. On the end of the brake beam, at the face of each wheel, is a brake shoe. Now, when the air is allowed to enter the brake cylinder the piston is pushed out. These pistons travel the length of the cylinder until it pulls the shoes on the wheels.

Q. When you apply the air in emergency that does not mean the air goes on the wheel?

A. No.

Q. Explain where that air goes.

A. I might finish what I was saying to make it a little more complete.

Q. Go ahead.

A. When the brake shoe goes on the wheel, and the wheel is rotating, the brake shoe tends to stop the rotation of the wheel, and the overhang connected to the truck prevents the brake shoe from turning around with the wheel. In other words, there is a hangar pull made by the pressure of the shoe and froction as a result of this pressure. Now, this friction reduces the speed of that train, or retards the train, until the train is stopped. If the brakes are kept applied, the brakes hold in proportion to how much air is put in the brake cylinder. If you build up cylinder pressure to any given amount the brake applies in proportion to that pressure. If you build it up to maximum pressure the

brakes are doing their maximum amount of work. As you [fol. 277] graduate the air out of the brake cylinder you reduce the holding power in proportion to how much you reduce the pressure power.

Q. Now, how does the engineer apply the brakes in emergency?

A. By opening the brake valve on the engine to full righthand position.

Q. Well, what, if anything, does he do to open the brake valve?

A. He gets hold of it with his hand, he usually uses the hand nearest to it, as a rule.

Q. Has it a lever on it?

A. A lever?

Q. Has it a lever on it?

A. No, the valve is called a brake valve, but it really is casing with rotary valve.

Q. When the engineer wants to put the brake in emergency, what does he take hold of?

A. The handle on the brake valve.

Q. Then what does he do?

A. He pushes it around to the righthand position as far as he can push it.

Q. Where does the air go?

A. It comes out of the brake pipe to the atmosphere. That is the automatic feature of it. These brakes are applied by reduced air, and the air comes out of the brake pipe to the atmosphere.

Q. And then the shoes of the brakes are applied to the wheels?

A. May I make it clear as just exactly how that pressure is operated? May I just state that in a brief way?

[fol. 278] Q. Yes, we will be glad to have you do that.

A. In the first place, there is a line down through the train. All the cars are coupled together by air hose. There are angle cocks at each end of each one. When the hose are coupled together the angle cocks are all open, except the rear one. This pipe, as it passes through the train, can be filled with air from the locomotive by putting the brake valve on the release position or the running position. To each car is a branch pipe that leads out to a triple valve or another equivalent device under each car. That means that if you put air into the brake pipe the full length of the

train, air flows through this branch and goes to the triple valve. In the triple valve is a piston and slide valve, a graduated slide valve. Now, when you charge up the air moves against this piston in each valve under each car, pushing it to release position, and it opens a little leak groove. This lets the air pass around it and charge the reservoir. On some of these brakes they have one reservoir, some two reservoirs, and some three reservoirs, but all reservoirs are charged. Now, the air is on the other side of this piston in the reservoir, with brake pipe pressure here on this side, (indicating), and in this instance there was ninety pounds of pressure in the brake pipe and ninety pounds of pressure in the reservoir on the other side. Now, you can readily see that if you change the pressure on this piston, by reducing the brake pipe pressure away from the piston, the reservoir pressure on the other side is the greatest, and by reducing the brake pipe, easy or [fol. 279] fast, the piston is pulled over towards the application position and the slide valve attached to the piston makes an opening for air to flow from the reservoir to each brake cylinder, going from the reservoir to the brake cylinder of that car.

Q. Are there any other items which affect the stopping of trains when the emergency brake is applied.

A. Speed.

Q. What else?

A. Grade.

Q. What else?

A. Braking ratio.

Q. Does the length or weight of the train have anything to do with it?

A. Oh, my yes.

Q. At the time this test was made, which was testified to by Mr. Rowe, were you present?

A. On April 19?

Q. Yes.

A. Yes.

Q. At that time did you have Engine 504?

A. Yes.

Q. What cars did you have?

A. Mail Car 65, Baggage Car 37, Coach 280, and Club Car.

Q. Now, what did you do in making this test?

A. I rode the engine.

Q. Where were you on the engine?

A. I was in the cab of the engine.

Q. Describe how that test was made.

A. The train was run down there, and they tried to get [fol. 280] her going as near sixty miles an hour as they could, and on the first test as they passed the first man, the emergency brake was applied and the train was allowed to come to a stop.

Q. Did you have a man standing at the track where the emergency was applied?

A. Yes.

Q. And what distance did that train travel after the emergency was applied?

A. On the first stop?

Q. Yes.

A. 2,207.

Q. Did you make any other test?

A. Yes, we backed up and made a second stop.

Q. How soon afterwards?

A. Oh, probably twenty—twenty-five minutes, something like that.

Q. How was that test made?

A. In the same manner, except the time was caught between the first man and the second man, one-half mile distant.

Q. Was it with the same engine?

A. It was with the same engine and same cars.

Q. Just explain then how that test was made.

A. We came down through there, and as we passed the first man I started my stop watch, and when we got to the second man I stopped it—the engineer applied the brakes in emergency application and the train came to a stop.

Q. In what distance did it come to a stop?

A. 2,172 feet.

Q. You heard the testimony of Mr. Gramling, the engi- [fol. 281] neer, and Mr. Groth, regarding this train on the night of the accident?

A. Yes.

Q. The train going sixty miles an hour on that grade.

A. Yes.

Q. You heard Mr. Groth's testimony too?

A. Yes.

Q. Assuming that testimony to be true, assuming the testimony in regard to that grade to be true, with a brake in good condition, automatic brakes, with the emergency applied, have you an opinion as to within what distance that train could stop?

A. This particular train?

A. Yes.

A. Not less than 2,050 feet. It could not possibly have been stopped in less than that.

Q. Are there any brakes you are familiar with which are more effective than airbrakes on trains?

A. Not that I know of.

. . . . . .

Q. What type of brake was on No. 504?

A. E. T. brake, engine and tender brake.

Q. Is it an airbrake?

A. It is an airbrake similar to those on cars, only it has a slightly different function.

Cross-examination.

Mr. Stassen:

Q. In your opinion how far would it take that train and those cars you made the test with on the grade to stop at [fol. 282] a speed of fifty miles an hour when the brake was applied?

A. Slightly less than one-half——

A. I will answer that in just a moment.

Mr. Stearns: If you want a pencil and paper to work that out on you may have it.

A. Please. (Figures.) You mean on a basis of 2,050 feet?

Q. Yes.

A. About 900 feet.

Q. 900 feet at what speed?

A. Fifty miles an hour.

Q. At a speed of forty-five you stop in 1,025 feet?

A. I have not run through that. Oh, at fifty, that is different.

Q. What have you calculated, what speed?

A. Probably I have not added it right. It is just a trifle under one-half at a speed of forty-five miles an hour.

Q. One-half the distance you mean at forty-five miles an hour?

A. Yes. The relation of 2,500 as to 3,600 is what it is. It would be somewhere between.

Q. You say you take the square of speeds?

A. Yes.

Q. As to the proportion of distance?

A. Yes, it would be 36 as to 25.

Q. So that the relation of 2,050 would have the same relation to the speed you could stop in?

A. I just reversed it.

Q. That same table applies straight through?

[fol. 283] A. There is a slight variation from the square. If you double the speed, it runs about five times as far. For instance, at 30 miles an hour—a sixty-mile hour stop will be about five times as far as a thirty mile an hour stop.

Q. You reach that by calculation of square? That sort of a rule?

A. No. You take the formula for stopping trains after you know all the elements. The first item is the square of speed, that is above the line.

Q. Well, would the distance you could stop at a speed of thirty miles an hour be the relation of 36 to 9?

A. A little less than 900, because of the square of speed or the relationship that actually exists. It is a very fair, simple estimate to use, the square of speed without any technicality, or trying to get within——

Q. Well, is that a fair, accurate system?

A. Yes.

Q. So the squaring of speeds——

A. When you double the speed the stop is usually about five times as far, but when you take the relationship of sixty-one, sixty-three, sixty-four, fifty-nine and fifty-eight miles an hour, then you are very close. When you square the speed you have then the relationship very close, but when you jump right from sixty to thirty miles an hour, or jump from sixty back to forty-five miles an hour, then you have to have that allowance, and as near as I have been able to check up at forty-five miles an hour it is seven-six-

[fol. 284] teenths of the distance that it is at sixty miles an

hour. That is slightly under the square of speeds in proportion.

Q. Then it is your opinion that a locomotive, or that Locomotive No. 504, with that group of cars, with which you made the test, should stop after the emergency is applied, from the time the emergency is applied within a distance of between 2,050 to 2,200 feet?

A. Yes, at sixty miles an hour.

Q. Do you know how many seconds it took 504 to stop at the time of the first test, from the time the brake was applied?

A. How many seconds it took 504 to stop at the time of the first test, from the time the brake was applied?

Q. Yes.

A. No.

Q. You did not use your stop watch on that?

A. Not during the stop, no, sir.

Q. Or on the second test?

A. I think it would be around forty seconds, forty-two or forty-three seconds.

Q. But you did not use your watch?

A. No.

Redirect examination.

Mr. Stearns:

Q. After the emergency is applied how long does it take for the brakes to take full effect?

A. With this train?

Q. Yes.

A. The full pressure will not be completely on until four seconds of time has elapsed.

[fol. 285] Q. Now, when the brake valve is pulled, throwing the air into emergency, do the brakes start to take hold?

A. The E. T. Valve is pulled almost instantly toward the application position; the first brake in about two tenths of a second, the third brake in about four-tenths of a second, and the last one will not be moved until just about a trifle under one second. It takes about that long to get the reduction through the train. You have one triple valve, and to trip them you would take the air out of the brake valve, and after each goes to position and the air begins to flow

from the air valve to the brake cylinder, and the time it takes to get the air across the reservoir to the brake cylinder is four seconds, and on two of those brakes, the E. T. equipment, it is a trifle over two seconds with the other two, the Universal equipment, and it is four seconds on the engine and tender brake to get maximum pressure.

Q. Now a train going sixty miles an hour goes how many feet in a second?

A. Goes sixty-six feet in a second.

Q. A train going twenty miles an hour goes six miles in what time?

A. Six miles in how many minutes?

Q. I want to find out in what time a train going twenty miles an hour goes in six miles?

A. One-third of sixty—it would take it—in miles per hour you mean?

Q. I mean this: if a train is going along twenty miles an hour, how long would it take that train to go six miles at that rate of speed?

[fol. 286] (No answer.)

Mr. Stearns: Oh, never mind. I have it figured.

A. I thought about one-third.

Mr. Stearns: That is all.

A. About one-third mile?

The Court: Eighteen minutes to be exact.

A. Three.

Mr. Stearns:

Q. A train going ten miles an hour goes what distance in a second?

A. 14.6 feet.

Q. A train going ten miles an hour goes what distance in two seconds?

A. Twice that.

Q. Is it twice that?

A. In two seconds?

The Court: It has to be.

Mr. Stearns: I do not think so.

A. Let me lead you through that.

Mr. Stearns: We haven't time.

A. In ten miles an hour it is 14.6 feet; at sixty miles an hour it is 88; at thirty miles an hour it is 44; at twenty miles an hour it is one-third or about 29.

Q. You say at sixty miles an hour a train goes 88 feet in a second?

A. Yes.

Q. You testified to 66 feet.

A. 88.

Q. A train going sixty miles an hour goes 88 feet in a second.

A. Yes; I misspoke myself, that is all.

[fol. 287] Recross-examination.

Mr. Stassen:

Q. It is just a matter of arithmetic, isn't it?

A. Sure.

A. Sure, I did not know what you were driving at.

Q. It simply means that it goes 5,280 feet in sixty seconds?

A. Yes.

Q. Just divide it and you get 88 feet.

A. Yes, or divide 88 feet per second by sixty and you get 1.46, or for any other speed multiply that by 1.46 and you get the feet for any speed.

Q. At ten miles an hour it takes six minutes to make one mile?

A. I believe so.

Q. And at twenty miles an hour it takes three minutes to make one mile?

A. Yes.

Q. So it takes eighteen minutes to make six miles going at a speed of twenty miles an hour?

A. That is right.

Q. And at ten miles an hour it takes thirty-six minutes to make six miles?

A. That is right.

Redirect examination.

Mr. Stearns:

Q. Did you make the measurements when you tested this distance and the brakes?

A. Yes.

Q. The measurement of 2,207 and 2,172 feet was made by you?

[fol. 288] A. I was there and watched it measured.

Q. You checked it, did you?

A. Yes.

Recross-examination.

Mr. Stassen:

Q. Who made the actual measurements?

A. Rumple and Riley. I do not know exactly who handled the tape, but we were all around there, and I observed what the tape said.

Rediret examination.

Mr. Stearns:

Q. What length of tape was it?

A. One hundred foot tape, I believe it was. I was interested in the measurement and watched it.

Recross-examination.

Mr. Stassen:

Q. If you had two objects on a track, one moving sixty miles an hour, and the other moving twenty miles an hour, and you started with the two objects 800 feet apart, by the time the faster object on the rail traveled to the point of 800 feet, where the slower object had been, the slower object would have traveled a distance of 266 feet, would it not?

Mr. Stearns: That is objected to as incompetent, irrelevant and immaterial, a hypothetical question, assuming a state of facts not in evidence.

The Court: You may answer the question.

A. I do not know whether it is 266 feet.

Q. You can figure it out, can you not?

[fol. 289] Mr. Stearns: You better give him the noon hour to do that in.

Mr. Stassen: All right, I will.

Q. With an object going twenty miles an hour, it will cover one-third of the space that an object going sixty miles an hour will cover?

A. Yes.

Q. So if an object going sixty miles an hour covers 800 feet, the object going twenty miles an hour is going to cover 266 feet, is it not?

A. That sounds right.

Q. Then where an object is going sixty miles an hour while it covers that space of 266 feet, the object going twenty miles an hour is going to go on another 80 some feet, is it not?

A. It might be that much.

Q. It would be just one-third again?

A. Yes.

Q. And if the object going sixty miles an hour is slowing down and the other object keeps going twenty miles an hour, the ratio is going to increase for the smaller object?

A. That is right.

Q. In other words, the smaller object would be covering more distance in proportion than the larger object, if the smaller object were continuing to run at the rate of twenty miles an hour?

A. But if it is not, it will not.

Q. You say within two-tenths of a second after this brake valve is prone the airbrake begins to take effect?

A. Yes, the air begins to flow, it does not take effect [fol. 290] until you get the piston out, you got to get the piston to take up all the slack of the brake rigging and have the brakes grab on the wheels.

Q. Within what distance of time, with the equipment on 504 does the brake begin to take effect?

A. Two-tenths of a second more.

Q. Four-tenths of a second?

A. Yes.

Q. That is when the brake begins to take effect?

A. Yes.

Q. I suppose in six-tenths of a second it begins to take effect on the second car?

A. It starts to.

Q. I suppose in a little over a second it grabs on the third, or last car?

A. I gave you them all. Practically a second, or substantially a second.

Q. You said a little less than a second?

A. A little less than a second. It is so close to a second you might call it a second.

Q. Then in another two-tenths of a second for the moving apparatus you have been talking about you got the time within which it begins to take effect on the last car?

A. Very small.

Q. Within four seconds you got the power on in full force?

A. Four seconds after the valve moves, you have to add the time it takes to make the movement of the valve.

Q. The valve moves when the engineer swings it?

[fol. 291] A. The first valve, there is a second one behind it a little and the third one a little further back, and so on.

Q. That is about two-tenths of a second apart you say, these various valves?

A. Yes; about that.

Q. So it begins within four-tenths of a second and increases to four seconds at which time these brakes are grasping with increasing force?

A. Yes.

Q. As they grab with increasing force the train is slowed down more rapidly?

A. Not very fast.

Q. More rapidly in proportion?

A. Oh, a little bit.

Q. In other words, if only partly applied then it would not slow down as rapidly as if you threw them on in full force, would it?

A. No.

Defendant rests.

Court adjourned at this time until May 25, 1934.

May 25, 1934.

1:30 session, pursuant to adjournment. All parties present.

STATEMENT AS TO LIFE EXPECTANCY

Mr. Stassen: Plaintiff reads into the record by consent of counsel, the American Experience Table of Mortality,

prepared by Life Insurance Companies, published in Woodman's Diary, the Lawyer's Aid, giving the expectancy in years of a man aged 47 as twenty-three and eight one-hundreths years.

[fol. 292] AGREEMENT AS TO TESTIMONY BEFORE CORONER

It is agreed that if the reporter who took the coroner's inquest in this matter were present she would testify that she took down shorthand notes of the testimony of Peter Gramling, the Engineer, as follows:

"Q. Now, with reference to the second accident, what did you first notice?

A. I noticed something down on the track, I figured it was a couple of dogs at first, running down the line.

Q. You figured it was a couple of dogs running down the line?

A. Yes.

Q. That was down toward Randolph, a couple of miles out of Randolph?

A. Yes.

Q. And how far away was this object that you could see?

A. Well, it might have been eight car lengths, coach lengths, might be a little more, might have been a little less."

and further the same witness testified:

"Q. How close to it were you when you saw it was a speeder?

A. About six car lengths away.

Q. About six car lengths away?

A. About five or six.

Q. You mean you had closed in a matter of probably two or four car lengths?

A. Yes.

Q. When you saw it was a speeder.

A. A speeder."

[fol. 293] (Mr. Stassen shows transcript to Mr. Stearns.)

Mr. Stearns: It would not impeach the fireman at all. You had him right before you and you could have asked him anything you wanted to.

Mr. Stassen: He said he did not remember.

Mr. Stearns: We object to anything going in about the fireman.

Mr. Stassen: I submit it for the ruling of the Court. You are not objecting to the Court Reporter being here.

Mr. Stearns: We object to anything going in about the fireman.

(Attorneys confer with Court. Reporter was not called and nothing further was taken on this.)

Mr. Stassen: Plaintiff rests.

DEFENDANT'S MOTION FOR DIRECTED VERDICT

Mr. Stearns: The defendant now moves the Court to direct the Jury to return a verdict for the defendant on the grounds: first, that the plaintiff has failed to show any actionable negligence. On the further ground that the plaintiff has failed to show any actionable negligence which was the proximate cause of the injury and death of R. C. Rambo. On the further ground that R. C. Rambo assumed the risk as a matter of law. On the further ground that Rambo violated the rules of the Company, barring recovery. On the further ground that Rambo's negligence was the sole cause of his accident and death. On the further ground that plaintiff has failed to show any violation of the Federal Statutes, including the Federal Boiler Inspection Act, which in any manner proximately caused the accident and death of R. C. Rambo.

[fol. 294] The Court: Denied.

Mr. Stearns: Exception.

The Court: By the denial of this motion, ladies and gentlemen of the Jury, it does not mean that I am passing on it one way or another finally, but I am submitting the case to you for your determination, and what I do in ruling on the motion you are not to concern yourselves with.

Argument to the Jury on behalf of the defendant made by Mr. Stearns.

* * * * * * * *

Argument to the Jury on behalf of the plaintiff made by Mr. Stassen.

* * * * * * * *

CHARGE

Ladies and Gentlemen of the Jury:

This, as you know, is an action brought by Mary Rambo, administratrix of the estate of Roy C. Rambo, deceased, against the Chicago, Great Western Railroad Company. The administratrix is the plaintiff in this action. The Railroad Company is the defendant.

It appears that on the nineteenth of March, 1934, the plaintiff was, by the Probate Court of this County, appointed the administratrix, and this action is brought by her for her benefit and the benefit of the minor children.

It appears, and is admitted, that on the eighth of December, 1933, Roy C. Rambo was employed by the defendant railroad in interstate commerce, and the Railroad Company was at that time engaged in interstate commerce. so [fol. 295] we have the laws of the United States applying in this case together with the laws of the State of Minnesota, and it also appears that Roy C. Rambo met his death by being struck by an engine operated by the Chicago Great Western Railroad Company in interstate commerce.

Your duties are to decide the disputed question of fact that the Court gives to you for your decision, and in deciding these facts you are to follow the law as the Court gives it to you. You are not, of course, to accept the arguments of counsel as to what the evidence is, unless that agrees with your own recollection of what the evidence was. Now, it is true that at times some jurors have a prejudice or bias against a Railway Company, and against personal injury lawsuits but it is your duty in this case to arrive at your verdict solely upon the evidence and the law as given, without sympathy or bias one way or another, and to the end that your verdict will be fair, just, reasonable, and impartial. You are not to try to ascertain what the Court's idea of the case may be, because the Court has no idea of the facts and evidence, that is what you are here for. The Court does not pass on those things. You are to decide the case according to the evidence as you heard it from the witness stand and the law as the Court gives it to you. You are the judges of the facts.

The plaintiff in this case claims; it is first claimed that the accident was caused by the negligence of the Railroad Company's station agent, because he did not warn Roy

[fol. 296] Rambo, and because of the negligence of the engineer, and it is also claimed that there was no pilot on this engine.

You are instructed not to pay any attention to whether or not there was a pilot on the engine because under the law that could not have been the proximate cause of the accident, or any cause of the injury. It was merely a circumstance, the same as if the engine had been painted red or some other color. The accident would have happened in any event, no matter what condition the pilot was in. That was not the proximate cause of the accident, so disregard and eliminate that from your minds.

You are not to consider whether or not the station agent should have gotten out there sooner and warned Mr. Rambo. That is not for your consideration, because there was no duty on the part of the station agent to look out for speeders or section men. No duty devolved upon him to do that, that is not what he was hired for, and the Railroad Company cannot be held liable because he did not do something which you may think he should have done.

The question of speed of the engine is not for your consideration. It is not unlawful for an engine to be traveling at the rate of sixty miles an hour. So eliminate the question of speed from your minds.

The question of whether or not the engineer was negligent and did not act promptly and properly at the time of the accident is not for your consideration. It is the law that [fol. 297] when a person is confronted with a sudden emergency, the mere fact that somebody else might have acted differently to some extent does not mean that that person was negligent. So eliminate the question of negligence of the engineer from your consideration.

There is only one question that will be submitted to you for your consideration, and that is, whether or not the Railroad Company complied with the law with reference to headlights on the engine. That is the only question of negligence in this case.

It is the law for you to pass upon, not saying that the Railroad Company was negligent, but it is for you to consider:

"It shall be unlawful for any carrier, that is the Railroad Company, to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all

parts and appurtenances thereof, are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb."

It is also the law that the Interstate Commerce Commission may designate certain rules that the railroad must comply with in order to comply with this law. The Interstate Commerce Commission, Bureau of Locomotive Inspection, has passed a rule known as Rule No. 129, which reads as follows:

"Each locomotive used in road service between sunset and sunrise shall have a headlight which shall afford suf- [fol. 298] ficient illumination to enable a person in the cab of such locomotive who possesses the usual visual capacity required of locomotive engine men, to see in a clear atmosphere, a dark object as large as a man of average size standing erect at a distance of at least eight hundred feet ahead and in front of such headlight; and such headlight must be maintained in good condition."

Plaintiff claims this headlight did not comply with the law and that rule, and because it did not comply with that law and rule that that was the proximate cause of the injury to Roy C. Rambo.

The Railroad Company claims that this rule and law with reference to headlights was complied with in every respect, and that there was nothing the matter with the headlight. The Railroad Company also claims that, even assuming the headlight was defective to some extent or entirely, that that was not the proximate cause of the accident; that the proximate cause of the accident was the failure of Roy C. Rambo to observe and obey the rules which they had promulgated for running and operating a speeder, and particularly with reference to keeping and maintaining lights on it and getting the line ups of trains and seeing that the track was clear. The Railroad Company claims that this was the sole cause of the accident to Roy C. Rambo.

In passing upon these questions it will become necessary for you to know what negligence is. Negligence is defined as follows:

The term, "negligence," has been defined by the National Supreme Court to be the failure to do what a reasonable [fol. 299] and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person under the existing circumstances would not

have done. The essence of the fault may lie in the ommission or commission. The duty is dictated and measured by the exigencies of the situation. Negligence has always relationship to the circumstances in which one is placed, and what an ordinarily prudent man would do or omit in such circumstances.

Contributory negligence has been defined as the negligent act or omission of the person injured, which concurring and co-operating with the negligent act or omission of the defendant, or an employe of defendant, for whose conduct defendant is responsible, is the proximate cause of the injury. Contributory negligence involves the notion of some sort of breach of duty on the part of the employe, and since it is ordinarily his duty to take some precaution for his own safety when engaged in hazardous occupation, contributory negligence is sometimes defined as a failure to use such care for his safety as ordinarily prudent employes in similar circumstances would use. Contributory negligence, thus defined, is the negligent act of a plaintiff which concurring and cooperating with the negligent act of a defendant is the proximate cause of the injury.

The duty was absolute on the part of the Railroad Company to maintain this light according to the law, as read to you, at all times, and the mere fact that an employe was [fol. 300] contributively negligent does not defeat that employe's right to recover. It is only when his contributory negligence goes so far as to become the sole cause of the accident, the proximate cause of the accident, that the negligence on the part of the employe defeats a recovery on his part.

The burden of proof is on the plaintiff to prove that the accident happened the way plaintiff says it did, and that the Railroad Company did not maintain a proper headlight, and the failure to so maintain a proper headlight was the proximate cause of the accident or concurring cause that proximately caused the accident. Plaintiff must prove this by a fair preponderance of the evidence, and by a fair preponderance of the evidence is meant the greater weight and credibility of the testimony.

By proximate cause is meant such a cause as follows in an unbroken sequence, without an intervening efficient cause, from the original act or omission.

Now, as I have told you the Railroad Company claims that the sole, proximate cause of the accident was the fail-

ure of R. C. Rambo to obey and follow the rules of the Company.

It was the duty of the defendant Railroad Company to provide certain rules for the government of its train and employes in the transaction of their business, in the performance of their duty; and certain rules of the defendant company have been offered in evidence here for your consideration. It was the duty at the time of this accident of [fol. 301] Roy C. Rambo to observe and obey these rules in the performance of his duties.

"Where the duties of a servant in given circumstances are properly specified in unambiguous and reasonable rules of the master, of which the servant has knowledge and to which he has assented by entering and continuing in the services, his non-observance of and disobedience of them at a time when they are capable of being observed, is negligence, as a matter of law, and is not to be judged by the undefined and varying requirements of ordinary care."

If you find from the evidence in this case that the plaintiff disobeyed any rules of the Company with reference to lights on his handcar or speeder, with reference to getting the line up of trains, or any other rules that are in evidence, you will then decide that Roy C. Rambo was negligent, and then you will determine whether or not that negligence was the proximate cause of the accident. If this disobedience or non-observance was the sole, proximate cause of the accident, then Rambo is not entitled to recover anything at your hands, and your verdict must be in favor of the defendant Railroad Company.

If you find that the headlight on the engine complied with the law and rules of the Interstate Commerce Commission, as I have read them to you, then the Railroad Company is not liable and the plaintiff cannot recover.

If you decide that the headlight was not in proper condition in order to comply with the law, as I read it to you, [fol. 302] yet if you find this failure to comply with the law was not the proximate cause of the accident to Roy C. Rambo, then he is not entitled to recover anything from the Railroad Company and your verdict must be for the defendant.

If you find that the Railroad Company did not comply with the law with reference to headlights, and that Rambo himself was negligent, and that the negligence of both the Railroad Company and Roy C. Rambo concurred so as to

be the proximate cause of the accident, then the plaintiff is entitled to a verdict at your hands, and you will proceed to assess his damages, or if you find that the sole, proximate cause of the accident was the failure to keep and maintain a headlight, if you find there was such a failure, and that this failure was the sole, proximate cause of the accident, then you will allow the plaintiff damages.

If you decide that the plaintiff is entitled to a verdict at your hands from all the evidence and instructions and arguments of counsel in this case, the damages are to be assessed as follows:

No compensation can be awarded for wounded feelings; for the loss of companionship and comfort of the deceased, or for his pain and suffering, but the true test is what, in view of all the facts in evidence, was the probable pecuniary, that is money, interest of the beneficiaries, that is the wife and children in the continuance of life of the deceased, Roy C. Rambo. The damages allowed can only be compensatory, and the measure of that is what the bene- [fol. 303] ficiaries, the wife and five children in this particular case, necessarily lost in and by the death of the decedent, Roy C. Rambo, in a money way.

In measuring these damages the Jury are at liberty and should take into consideration the age, health, and expectancy of life of the deceased; the decedent's earning capacity; his character; his habits; mode of living; employment; mode of treatment toward his family, his wife and five children in this case; the amount he contributed out of his wages to them for their support, and calculate from all those facts the present value and amount which the Jury, as reasonable and practical men and women, may find and believe the six beneficiaries have lost because of the death of Roy C. Rambo.

The approved measure of recovery is the present cash value of the future pecuniary or money benefits which the beneficiary might reasonably have received but was deprived of by the death, making adequate allowance for the earning power of money.

The Jury must determine the present value of the pecuniary or money loss calculated as bearing interest at the highest net rate that can be had on money safely invested.

By present value is meant such sum which when put out at interest at a given rate would produce for the period of the expectancy the amount of his contribution annually and

with the last payment both the principal sum and interest would be exhausted. In other words, if, for example, the [fol. 304] contribution were one dollar a year for a period of ten years, the Jury would figure what sum, if put out at the highest rate that can be had on money safely invested would produce one dollar a year for ten years and with the last payment both the principal sum and the interest would be exhausted.

To such a sum, if you find plaintiff is entitled to *to* recover at your hands, you will add the reasonable value of the funeral expenses.

Your verdict in this case will be either:

"We, the Jury empaneled and sworn in the above entitled action, find for the Defendant."

or

"We, the Jury empaneled and sworn in the above entitled action, find for the Plaintiff and assess her damages at $— and we apportion said damages as follows, to wit.":

It is the law that the Jury should apportion these damages among the widow and five children accordingly as they see fit to apportion it. The first sum will be a blank sum, and the other six blank lines are for you to apportion the verdict, and the six sums you fill in to the widow and five children must add up to be the same as the original sum which you have filled in. That is, if you decide that you will use that form of verdict.

You are not to accept the testimony of witnesses blindly and follow it passively, it is your duty to consider it with care, subject it to the scrutiny of your judgment and experience, and accept it only insofar as it seems to you to be reasonable and true.

If you believe from the evidence that any witness has [fol. 305] wilfully and knowingly testified falsely with respect to any material matter, then you are at liberty to disregard the testimony of such witness with respect to other matters, except insofar as it is corroborated by other credible testimony. But you are the sole judges of the truthfulness of such witness, and you may believe or disbelieve his or her testimony accordingly as you deem it worthy or unworthy of belief.

You may take into consideration the interest of the witnesses in the result of the action; their appearance on the witness stand; the manner in which they gave their testimony, and all facts and circumstances disclosed by the evidence, and give to the testimony of each witness just such weight and credibility as you deem it entitled to and no more.

During the first twelve hours your verdict must be unanimous. After twelve hours five-sixths of your number may agree upon a verdict. If your verdict is unanimous it will be signed by your foreman only. If it is a five-sixths verdict it will be signed by all who agree upon the verdict.

When you retire to your jury room you will select or elect one of your members foreman to preside over your deliberations. If you arrive at your verdict during the absence of the Court, you will put your verdict in an envelope, seal the envelope, give it to your foreman and depart to your respective homes, and meet again in the jury room Monday morning, at which time you will be conducted into Court. You will keep your verdict secret until you deliver it in Court.

[fol. 306] If you should arrive at your verdict, notify the Bailiff, and if the Clerk is accessible, the Clerk may receive your verdict in my absence. Is that satisfactory?

Mr. Stearns: Yes.

Mr. Stassen: Yes.

Mr. Stearns: (Not within hearing of the Jury.)

EXCEPTIONS TO CHARGE

Defendant excepts to the charge of the Court in submitting to the Jury the question of whether or not the Federal Boiler Inspection Act and Rules of the Interstate Commerce Commission were violated and were the proximate cause of the death of Roy C. Rambo.

Defendant excepts to that portion of the Court's charge referring to the negligence of Roy C. Rambo and the concurring negligence of the Defendant in violation of the Federal Statutes and Rules of the Interstate Commerce Commission combining and producing the proximate cause.

The Court: I want to add one thing, ladies and gentlemen of the Jury: The words "concurring, combining and contributing" as given to you heretofore in my instructions have the same meaning.

Mr. Stassen: Plaintiff excepts to the refusal of the Court to give requested instructions I, II and III, and to the instructions of the Court taking away from the jury issue of negligence of the Station Agent, issue of the pilot, and the speed issue.

End of all proceedings.

[fol. 307] (Title of Cause)

VERDICT

Officer sworn to take charge of Jury at 3:40 o'clock P. M., May 25, 1934.

We, the Jury empaneled and sworn in the above entitled action, find for the Plaintiff and assess her damages at $15,000 and we apportion said damages as follows, to-wit:

To Mary Rambo, surviving widow of the deceased, the sum of	$10,000.00
To Idella Rambo, daughter of the deceased, the sum of	$1,000.00
To Willis L. Rambo, son of the deceased, the sum of	1,000.00
To Lavada F. Rambo, daughter of the deceased, the sum of	1,000.00
To Joyce M. Rambo, daughter of the deceased, the sum of	1,000.00
To Craig R. Rambo, son of the deceased, the sum of	1,000.00

Dated at Hastings, Minnesota, this 26 day of May, 1934, at 3:40 o'clock A. M.

(Signed) Mrs. Otto Haus, Foreman.

PLAINTIFF'S REQUESTED INSTRUCTIONS

I

If you find that there was a sufficient headlight under the law as defined to you or if you find that the headlight was not sufficient but that said violation of law was not [fol. 308] a proximate or contributing cause of this accident, you will then consider whether or not the station agent was negligent in not warning decedent of the approach of train No. 8 and in not warning the train crew of the presence of decedent upon the track.

(Refused.)

II

If you find that there was a sufficient headlight under the law as defined to you or if you find that the headlight was not sufficient but that said violation of law was not a proximate or contributing cause of this accident, you will then consider whether or not the locomotive was being operated at an excessive rate of speed as it approached the scene of the accident, and if you find that it was being operated at an excessive rate of speed you will determine whether or not that excessive speed was a proximate or contributing cause of this accident.

(Refused.)

III

If you find that there was a sufficient headlight under the law as defined to you or if you find that the headlight was not sufficient but that said violation of law was not a proximate or contributing cause of this accident, you will then consider whether or not the defendant was negligent in operating its train without a pilot and if you find that defendant was negligent you will determine whether or not said negligence was a proximate or contributing cause of the accident.

(Refused.)

[fol. 309] PLAINTIFF'S EXHIBIT A

Certified copy of Letters of Administration issued to Mary Rambo by Probate Court of Dakota County, Minnesota, dated March 19, 1934.

PLAINTIFF'S EXHIBIT B

Line Up 12:50 P. M. 12/8
61 at Stanton
63 Oelwein about 2:30 P. M.
65 and 66 Annulled
No. 7 on Time
May run other extras
Line good only until 2 P. M.
RBC
B. A. E. Empire 12/9/1933

Signal Maintainer Eckstrom's line up of 1:00 P. M. December 8, 1933, which was read by Maintainer Rambo.

PLAINTIFF'S EXHIBITS

C—Picture of Track in distance
D—Picture of Track (North)
E— " " "
F—Picture of Track (Man on Track)

[fol. 310] PLAINTIFF'S EXHIBIT G

Interstate Commerce Commission

Bureau of Locomotive Inspection

Laws, Rules, and Instructions for Inspection and Testing of Steam Locomotives and Tenders and Their Appurtenances

(Rule 29, Page 27, Rule 129, Page 71, and Rule 141, Page 74, offered in evidence by Mr. Stassen, attorney for the plaintiff, for the use of the Court only.)

Page 27, Rule 29: Locomtives used in road service.—Each locomotive used in road service between sunset and sunrise shall have a headlight which shall afford sufficient illumination to enable a person in the cab of such locomotive who possesses the usual visual capacity required of locomotive enginemen, to see in a clear atmosphere, a dark object as large as a man of average size standing erect at a distance of at least 800 feet ahead and in front of such

headlight; and such headlight must be maintained in good condition.

Each locomotive used in road service, which is regularly required to run backward for any portion of its trip, except to pick up a detached portion of its train, or in making [fol. 311] terminal movements, shall have on its rear a headlight which shall meet the foregoing requirements.

Such headlights shall be provided with a device whereby the light from same may be diminished in yards and at stations or when meeting trains.

When two or more locomotives are used in the same train, the leading locomotive only will be required to display a headlight.

* * * * * * *

Lights

Page 71, Rule 129: (a) Locomotives used in road service.—Each locomotive used in road service between sunset and sunrise shall have a headlight which shall afford sufficient illumination to enable a person in the cab of such locomotive who possesses the usual visual capacity required of locomotive enginemen, to see in a clear atmosphere, a dark object as large as a man of average size standing erect at a distance of at least 800 feet ahead and in front of such headlight; and such headlight must be maintained in good condition.

* * * * * * *

Page 74, Rule 141: (a) Pilots.—Pilots shall be securely attached, properly braced, and maintained in a safe and suitable condition for service.

(b) The minimum clearance of pilot above the rail shall be 3 inches, and the maximum clearance 6 inches.

[fol. 312] Receipt

Station Randolph, Date Nov. 11, 1932.

Gang or Section No. 3, Signal Maintainer.

This will acknowledge receipt of Regulations for the operation of Motor, Hand, Push, T[illegible]er, and Velocipede Cars, dated November 1, 1932.

R. C. Rambo.

DEFENDANT'S EXHIBIT 1

Regulations for the Operation of Motor, Hand, Push, Trailer & Velocipede Cars

Revised November 1, 1932

DEFENDANT'S EXHIBIT 1-A

The rules herein set forth govern the handling and operation of motor, hand, push, trailer, and velocipede cars on the Chicago Great Western Railroad. They take effect November 1, 1932, superseding all previous rules and instructions inconsistent therewith, and must be kept available at Foreman's headquarters.

Special instructions may be issued by the proper authority.

[fol. 313] DEFENDANT'S EXHIBIT 1-B

General Rules

The General Notices, General Rules, Definitions and all regulations of the Book of Rules of the Operating Department govern in all cases as to the employment, conduct, and duties of all employes.

DEFENDANT'S EXHIBIT 1-C

Handling and Operation

Rule 1. For convenience in referring to them, motor cars, hand cars, push cars, trailers, and velocipedes will be referred to in the following rules as "Track Cars".

Rule 2. Track cars shall not be operated on the tracks of this Company without proper authority. No one except officers of the railroad and employes, in the discharge of their duties, will be permitted on track cars, unless authorized by proper officers.

Rule 3. Starting engines of track cars or allowing them to run while within the tool car house or any other building,

or filling gasoline tanks while engine is running is prohibited.

Rule 4. Immediately before starting on a trip, Foreman must inspect car and shall assume no risk of accident because of known defective condition.

[fol. 314] Rule 5. When practicable, the Operator of a track car must, at commencement of day, obtain from Train Dispatcher written advice of train movements expected. It shall be understood that such advice is good for not to exceed one (1) hour, and that same is not a guarantee against unexpected train or engine movements not entered thereon. Additional information should be obtained from Dispatcher during course of the day as weather conditions or other circumstances may make advisable.

(X) marked with pencil.

Rule 6. Before starting a definite understanding shall be had among the men as to the part each man will take, if necessary to quickly remove the car from the track in case of emergency, and the place in which each man is to ride shall be arranged. So far as practicable, each track car shall be operated by one person who is thoroughly familiar with the car. If necessary to push the car to start it, the two men riding at the rear will do the starting. No one must get on a moving track car except from the rear.

DEFENDANT'S EXHIBIT 1-D

Rule 7. Track car Operators shall test brakes immediately after starting cars to see that they are working properly. Brakes found defective must be adjusted or repaired before car is operated further.

[fol. 315] Rule 8. One man shall keep a lookout to the front and to the rear. Foreman shall see that tools are properly placed on the car, and if force is sufficient, a man on each side of the car shall be designated to watch the tools and see that they do not shift or fall off the car.

Rule 9. Men shall not be permitted to stand on motor cars or on push cars attached to motor cars. Track jacks, water barrels, etc., must be carried at side of car and securely fastened. They must not be used as seats for the men.

Rule 10. Riding on push or trailer cars loaded with ties, timbers, or other heavy materials is prohibited. Such materials must be so loaded that they will not fall off cars and be carefully watched.

Rule 11. Particular caution must be exercised in operating cars around curves and in fog. Flagman must be sent out in advance of car, if necessary, a sufficient distance to insure full protection.

Rule 12. No track car will exceed a speed of twenty (20) miles per hour. When attached to motor cars, standard trailers equipped with seats for men may be pulled fifteen (15) miles per hour. Standard rigid coupler will be used between motor and trailer, and, under no circumstances, shall a trailer or push car be shoved ahead of a motor car. [fol. 316] Section and Bridge and Building motor cars carrying a large number of tools must not exceed a speed of fifteen (15) miles per hour. Hand cars must not exceed ten (10) miles an hour.

Rule 13. Cars must be operated under complete control when passing through cities, towns, or villages, at highway crossings; over switches; or when running beside cars standing on a nearby track, and at such reduced speed as will permit a stop without striking any obstruction, pedestrian, or any other vehicle. Particular attention is directed to the danger of striking vehicles at crossings and possibility of flangeway being fouled by loose rock, etc. Many fatal and serious accidents have resulted from striking small animals, poultry, etc., in the vicinity of crossings.

DEFENDANT'S EXHIBIT 1-E

Rule 14. Under normal conditions track cars shall be operated with the current of traffic on double tracks. They must be operated with the understanding that trains may be run at any time, upon any track, in either direction. Extra precaution must be taken under bad weather conditions in the operation of track cars.

Rule 15. Track cars moving on second main or passing [fol. 317] tracks shall come to a full stop when meeting or being passed by trains on the other track, and men shall comply with time table special instructions governing inspection of passing trains.

Rule 16. A distance of two hundred (200) feet shall be maintained between hand cars; and a distance of six hundred (600) feet between motor cars, moving on the same track, in the same direction, or between such cars and the rear end of a train.

Rule 17. Attaching track cars to a locomotive, car or train is prohibited.

Rule 18. Torpedoes exploded by track cars must be replaced.

Rule 19. The operation of track cars between platform and a train discharging passengers at a station is prohibited.

Rule 20. When proceeding in either direction through remote controlled switches, track cars shall be brought to a full stop, and pushed over the movable portion of the switch.

At switches and derails controlled by interlocking plants, track cars shall be brought to a full stop and pushed over such switches and derails, unless route is lined for movement of track car in accordance with rules governing movements through interlocking limits when such cars may proceed at a speed of not to exceed five (5) miles per hour through interlocking limits.

[fol. 318] Rule 21. Under no circumstances shall a track car be pushed through a closed trailing point derail or switch. Car must be lifted over, cars being taken so that axles are not bent or car otherwise damaged.

Rule 22. Main line switches must not be thrown to accommodate movement of track cars unless absolutely necessary. The Foreman in charge is responsible for the handling of all switches. It is the duty of every employe to carefully observe the handling of switches and report any irregularity to proper authority.

DEFENDANT'S EXHIBIT 1-F

Rule 23. Track cars, when removed from the track, must be left not closer than six (6) feet from the nearest rail. They must not be left beside track at public crossings for any length of time.

Rule 24. Track cars must not be allowed to remain on main tracks or on running or switch leads unless sufficient attendants are available to immediately remove the car from the track in case of necessity.

Rule 25. Motor cars must not be overloaded. When necessary, because of an emergency, to transport a rail on a motor car, it should be loaded at side of car, as close to wheels as possible, where it will not bend or break the axle and may be easily unloaded.

[fol. 319] Rule 26. Track cars loaded with rail, frogs, or other heavy material must not go out on main track without proper protection.

Rule 27. Track cars must not be operated at night except when necessary. In such cases a (X) marked with pencil white and red light must be displayed, visible from both directions. A red and white lantern must be kept on motor cars ready for use at all times.

Rule 28. Touching or attempting to adjust any revolving parts of a track car while engine is running or car is in motion is prohibited.

Rule 29. The operation of non-insulated track cars over rails where track circuits are in use is prohibited.

Rule 30. Operators of track cars must have in their possession a copy of current working time table and be familiar with the rules and regulations contained therein and with time of trains over their territory. They must carefully observe signals displayed by all trains.

Rule 31. The shipping of track cars containing gasoline or oil in the supply tanks is prohibited.

Rule 32. A safe Foreman means a safe gang. The lives of patrons and employes depend upon his watchfulness and efficiency.

Rule 33. Above rules govern the handling and operation of motor, hand, push, trailer and velocipede cars on [fol. 320] the tracks of the Chicago Great Western Railroad Company. They are effective November 1, 1932, and

supersede all previous rules and instructions inconsistent therewith.

W. C. Groth, Division Engineer.

DEFENDANT'S EXHIBIT 2

Chicago Great Western Railroad Company

Witness Statement

Accident to R. C. Rambo, a Signal Maintainer, at Randolph. Date December 8, 1933. Hour 5:10 P. M.

(NOTE.—Have witness give names of all other persons that he knows of that were witnesses to the accident. Have witness sign statement, which should be attested by the person taking the same. Names of other persons present should also be given.)

Statement of Nicholas Schaack, Made to C. C. Rumple on the 9th Day of December, 1933, in the Presence of —— ——

My name is Nicholas Schaack. Age 15 years. I reside at —. I am a — by occupation. Am unmarried or married —. At time of casualty I was (State location and How Engaged) I was in the yard just south of the barn. I saw and heard the train coming. I saw the glare of the head-[fol. 321] light down the track before I could see the train. It was going pretty fast but I could not say how fast. I heard a motor car go by just ahead of the train and looked up to the track. I did not see any light on the motor car. It was too dark to see the motor car when I first heard it but when the train got closer I could see the motor car in the glare of the headlight. It was going the same direction the train was. When the train got close to it I could make out a man on the car but do not know which way he was looking. Before the train got to the car I heard it whistle. There was more than one toot but I do not know how many. A little while before the train got to the car I could see fire coming from the wheels of the train all along the side when the brakes were set. When they struck the car there was a flash of light. I did not want to look at it and went behind

the cornstack. The headlight was burning up to the moment it struck and burning after the train stopped.

Nicholas Schaack.

DEFENDANT'S EXHIBIT 3

Chicago Great Western Railroad Company

Book of Rules

Effective May 1, 1923

Page 172, Rule 944. Signal Maintainers shall report to and receive instructions from the Supervisor of Signals.

[fol. 322] Page 173, Rule 948. They must each have a copy of the current time-table, and be thoroughly familiar with the rules and regulations therein, and with the time of trains over their districts. They must carefully observe signals displayed by all trains, and assure themselves, before obstructing track, that all trains and sections due have passed. No notice will be given of extra trains, and employes must protect themselves as prescribed by the rules. Maintainers must provide themselves with reliable waches, and when possible compare time daily with a standard clock or with conductors' watches.

DEFENDANT'S EXHIBIT 4

Chicago Great Western Railroad Co.

Office of Engr. M. of W.

St. Paul, Minn., Nov. 13, 1928.

Section Foremen:
B. & B. Foremen:
Sig. Maintainers:

The motor car accident which occurred last week discloses the fact that men operating motor cars are not carrying lanterns to protect them for night operation of their motor cars.

Our rule provides that whenever it is necessary to run a motor car after sundown or before sunrise one red and one white lantern must be kept lighted and displayed for approaching trains.

[fol. 323] Most of our men have become imbued with the idea that they are going to be home by 5 o'clock and the carrying of lanterns is not thought of.

Please have it distinctly understood that all section, B&B Foremen and Signal Maintainers must carry lanterns on their motor cars at all times. Any failure in this will be cause for dismissal.

W. C. Groth, Engr. M. of W.

Circular No. 485.

Copy—Trk. Supervisors, H. A. Elwell. E. L. Waltz.

DEFENDANT'S EXHIBIT 5

Safety Always—Think!

Rules for Prevention of Accident—Injury

1924

Issued by Executive Safety Committee, Chicago Great Western Railroad Co.

Page 26: Do not use motor cars at night except when necessary. In such cases a white and a red lantern must be displayed visible from both directions.

[fol. 324] DEFENDANT'S EXHIBIT 6

Chicago Great Western Railroad Co.

Office of Engr. M. of W.

St. Paul, Minn., Oct. 28, 1929.

Section Foremen:
B. & B. Foremen:
Signal Maintainers:

I have just been studying a pamphlet on "Safe Practices in the Use of Motor, Hand and Push Track Cars." This

pamphlet is put out by the Railway Section of the National Safety Council.

Many of the rules agree with the rules in effect on our railroad, but many others go into detail a little bit more thoroughly and I believe they will be of use to you in the handling of motor cars, and I am giving you the benefit of them:

Careful Use of Car

Motor cars must be run slowly over frogs and switches and derails, around sharp curves, and when approaching interlocking plants or while running through them. They must be slowed down to ten (10) miles per hour and be under full control while passing through villages, towns or cities, in approaching a highway grade crossing, the speed of the motor car must be reduced to not exceed five miles per hour and the car brought under full control. Close observation shall be made to see that the crossing flangeways are free from obstructions. Those in charge of the motor car shall be alert to note, if the view along the high- [fol. 325] way is unobstructed, that vehicles approaching along the highway are at a safe distance before the motor car proceeds along the highway. If the view of the highway is obstructed or there are vehicles approaching at an unsafe distance, the motor car must be brought to a stop and must not proceed until it can be done safely.

Operation of Motor Cars at Night or In Fogs and Storms

Operation of motor cars at night or in dense fogs and storms creates an extra hazardous condition and should not be so operated except in emergency. Flagging and careful use of light signals are necessary and extra supplies of fuses and torpedoes should be provided.

Speed

Motors cars should not be run any time on a speed in excess of 15 miles per hour. The employe charged with operation of a motor car must have a standard watch, comply with the standard time rules, and have a copy of the current time card. He must see that the car is equipped with the proper supply of fuses, torpedoes, flags and lanterns.

Adjustment While Running

Adjustments must not be — while the car is in motion.

W. J. O.

Dec. 20, 1933.

[fol. 326] DEFENDANT'S EXHIBIT 7

Chicago Great Western Railroad Co.

Office of Division Engineer

St. Paul, Minn., Dec. 17, 1931.

All Sec. Foremen:
All B. & B. Foremen:
All Signal Maintainers:
Extra Gang Foremen:

A great deal has been written regarding motor car accidents. You have all been cautioned as to the necessity of securing a line-up. However, I am led to believe from the number of motor car accident reports, which I am called upon to investigate, that you are not securing the necessary line-ups.

Please understand that absolutely no excuses will be taken in so far as accidents with motor cars are concerned. This refers not only to accidents at highways, collisions with other cars or being struck by trains or light engines.

Effective Jan. 1, 1932, the working hours of all Section Foremen, B. & B. Foremen and Signal Maintainers will be from 8 A. M. to 5 P. M. You will note that this changes the Section Foremen's hours from the present 7:30 to 4:30. Arrangements have been made by the Chief Dispatcher to re-arrange the hours of all Agents at such points where it was formerly impossible for you to secure a written line-up from the Agent or operator prior to your going to work. All Agents and Operators will now report for work at such [fol. 327] an hour that Section Foremen, B. & B. Foremen and Signal men can secure the necessary line-up and this line-up must be in writing.

You gentlemen will save these line-ups from day to day, and at the end of each week, you will mail them to your Supervisor who will check up and report to me any in-

stances where their foremen did not receive the regular written line-up.

On the Main Line, where we have dispatcher's phone, the hours of the Agents and Operators will not be changed, but it will be necessary for the Section Foreman or the B. & B. Foreman or the Signal Maintainer to go to a dispatcher's phone and get this line-up both morning and noon. These line-ups will be put out by the Main Line Dispatcher at 7:50 in the morning and 12:50 at Noon on the telephone and you will be expected to take the line-up in writing.

On the W. M. & P. and on the M. C. & F. D., these line-ups will be put out at 8:05 in the morning and 1:05 in the afternoon.

You will, of course, understand that these line-ups are good only for one hour after receipt and in addition, conditions might arise that would necessitate the running of an emergency train or engine so that you must be prepared at all times, to protect yourselves by keeping sharp lookout and flagging ahead, where necessary, in order to protect the life and limb of yourselves and men.

We have several exceptions. The Section Foreman at Manning will secure his line-up over the telegraphone from Carroll and the Section Foreman at Northfield will secure [fol. 328] his line-up over the telegraphone from Randolph. Altura and Winona sections, on the Winona Line, will secure their own line-up on the telephone from Simpson. Section Foremen at Oran will secure his line-up from Readlyn.

These instructions, in so far as line-up being good for one hour is concerned, will not apply to Manly and Mason City—sections where the Rock Island are liable to present a train for handling between Clear Lake Junction and Manly in 15 minutes' notice. On these sections the foremen will be expected to protect themselves.

As stated above, no excuses for failure to comply with these instructions will be considered.

Please acknowledge receipt.

W. J. O. Dec. 20, 1933.

DEFENDANT'S EXHIBIT 8

Chicago Great Western Railroad Co.

Office of Division Engineer

St. Paul, Minn., Sept. 16, 1932.

All concerned:

A news dispatch of a recent accident on an Eastern Railroad wherein four section laborers were killed and two injured when struck by a fast train, prompts this letter to again caution you regarding the proper line ups and protection against such accidents.

[fol. 329] Every precaution must be taken to insure the safety of your men while working on the track as well as while moving on motor cars. The motor cars must not be moved without proper protection, and a sharp lookout maintained to the rear as well as ahead, and proper flagging equipment must be carried at all times, so that flagging can be performed either day or night. This means that in addition to the day flagging equipment, lanterns red and white must be carried on your motor car at all times.

This is a matter that roadmasters must personally check from time to time.

Our dispatchers are co-operating insofar as protection is concerned and when an extra train movement is made this movement is made known to you.

All you supervisors in extremely foggy weather if out at a point where you cannot get a line-up and it is dangerous to move the motor car without a line up, go to some farm house and telephone to the nearest telegraph station and secure a line up for yourselves. All you men are supposed to be men of good sound judgment or you would not be in the positions you are. Please, therefore, use this judgment in the operation of your motor cars.

W. C. Groth, Division Engineer.

Circular No. 687.
cc—All Roadmasters:
A. J. O. Dec. 20, 1933.

DEFENDANT'S EXHIBIT 9

Plat

[fol. 330] DEFENDANT'S EXHIBIT 10

Chicago Great Western Railroad Co.

Instructions: Each locomotive and tender must be inspected after each trip or day's work and report made on this form, whether needing repairs or not. Proper explanation must be made hereon for failure to repair any defect reported, and the form approved by foreman, before the locomotive is returned to service.

Locomotive Inspection Report

Locomotive No. 504.
Inspected at Oel. Time 11:20 P. M. Date 12-8-1933.

Repairs Needed

Put on New Pilot.
Repair left front cylinder cock in I on rear of tank.
See to grease in right main driving box collar.

Condition of Injectors Good, Water Glass Good, Condition of Gauge Cocks Good, Condition of Piston Rod and Valve Stem Packing Good, Main Reservoir Pressure 90-1108130, Brake Pipe Pressure Go-, Brakes Good, Safety Valve Lifts at 180, Seats at 178, Condition of Cylinder Packing Right Good, Left Good, Condition of Main Valves Right Good, Left Good, Signature Gramling.

Above work has been performed, except as noted, and this form is approved.

(Not readable), Foreman.

[fol. 331] DEFENDANT'S EXHIBIT 11

Chicago Great Western Railroad Company

Witness Statement

Accident to R. C. Rambo, Signal Maintainer, at Randolph, Date Dec. 8, 1933, hour 5:10 P. M.

(NOTE.—Have witness give names of all other persons that he knows of that were witnesses to the accident. Have witness sign statement, which should be attested by the person taking the same. Names of other persons present should also be given.)

Statement of Peter Gramling. Made to C. C. Rumple. Date of Dec. 1933, in the Presence of J. Felton

My name is Peter Gramling. Age, Years—. I reside at 153 So. Robert. I am an engineer by occupation. Am — (unmarried or married). At time of casualty I was (State location and how engaged).

I was sitting on the right hand seat box of Engine 504 on Train 8 looking ahead. Had four passenger cars. The train had been delayed at Rich Valley about fifty minutes because of another accident and the pilot of the engine had been removed. We passed Hampton about 5:05 P. M. and approaching the place where the second accident happened were running about 60 miles per hour. The accident was at 5:10 P. M. and it had gotten dark. The track is straight for ¾ mile or so and down hill in the direction we were [fol. 332] going. I first saw some object on the track in the glare of the headlight when the engine was 10 to 12 coach lengths away. It may have been a little less than 1,000 feet or could have been a little more. I saw no light on the object and when first seen it appeared to be two dogs running down the track. I pinched up on the brakes making a service application and when the engine was within 6 to 8 coach lengths I could make out for the first time that it was a motor car and a man on it going same way we were. I immediately continued the brake application into emergency, opened the sanders and started sounding a series of short blasts of whistle. I could make out a man on the car with his back to us, his coat collar turned up and looking ahead. I expected every second to see him make some

effort to get off the car but so far as I could see he never changed his position until struck.

There was a bright glare of light when the car was struck and burning gasoline ignited the cab curtains. There was some part of his burning clothing between the tank and baggage car. I cannot say just how far we ran before stopping. I used the sanders and made the shortest possible stop. The sanders were left running a little while after we stopped.

There are no highway or farm crossings near the place of the accident. No reason for whistling there as a rule.

Weather was cloudy—dark—not very cold.

We see the signal men along the track often but as a rule they are not out as late as this one was. If I had [fol. 333] known it was a motor car when I got the first glimpse of an object on the track I could not possibly have stopped before striking it.

I have been employed in engine service for about 35 years.

I saw the object ahead just as quick as I could see it with the aid of the headlight and was looking ahead all the time.

(Signed) Peter Gramling.

In District Court of Dakota County

Stipulation for Settlement of Case

It Is Hereby Stipulated by and between the parties to the above entitled action, that the foregoing within transcript of testimony, consisting of three hundred and eighty-four (384) typewritten sheets, contains all the evidence offered and received in evidence by the respective parties at the trial thereof, except Plaintiff's Exhibits C, D, E and F, photographs, and Defendant's Exhibit 9, a map, which cannot be attached hereto, but which are made a part hereof, and may be referred to by the parties; the motion of the Defendant for a directed verdict; the Court's ruling thereon, and the exception thereto; the request for instructions; the general verdict of the jury; the Court's charge to the jury, with all exceptions thereto by the respective parties; all objections to the evidence; the rulings of the

Court thereon, and all exceptions taken to such rulings; [fol. 334] and also all court proceedings had at the trial of said action, and that the same may be settled and allowed by the Court as and for a settled case herein.

Dated this 31st day of July, 1934.

Stassen & Ryan, Attorneys for Plaintiff. Stearns, Stone & Mackey, Attorneys for Defendant.

In District Court of Dakota County

Order Settling Case

I, W. A. Schultz, do hereby certify that the foregoing proposed case, consisting of three hundred and eighty-four (384) typewritten sheets, contains all the evidence offered and received in evidence by the respective parties at the trial thereof, except Plaintiff's Exhibits C, D, E and F, photographs, and Defendant's Exhibit 9, a map, which cannot be attached hereto, but which are made a part hereof, and may be referred to by the parties; all objections made at the trial; the decisions and the rulings of the Court thereon, and all exceptions taken thereto, including the motion of the Defendant for a directed verdict, the ruling of the Court thereon, and exception thereto; together with all exceptions taken thereto by the respective parties; the request for instructions; the general verdict of the jury, and all proceedings had at the trial of said action.

[fol. 335] I find that the case is conformable, and I hereby allow and settle the case as and for a settled case herein.

Dated this 31st day of July, 1934.

W. A. Schultz, District Judge.

In District Court of Dakota County

Motion for Judgment Notwithstanding the Verdict of the Jury

To the Plaintiff above named, and to Messrs. Stassen and Ryan, her Attorneys:

You Will Please Take Notice, that the above entitled Defendant, Chicago Great Western Railroad Company, a

corporation, will apply to and move the Honorable W. A. Schultz, Judge of the above named Court, at Chambers in the City of Hastings, Minnesota, County of Dakota, State of Minnesota, on the 23rd day of July, 1934, at 10:00 o'clock A. M. on said day, or at such other time and place as may be hereafter agreed upon between the Court and the attorneys for the respective parties:

1. For its order allowing and settling as a settled case herein the transcript of testimony at the trial proposed herein, as and for a case on the 13th day of July, 1934;

2. For its order vacating and setting aside the verdict heretofore rendered herein in the sum of Fifteen Thousand [fol. 336] ($15,000.00) Dollars, in favor of the Plaintiff, and for its order entering judgment notwithstanding said verdict, in favor of the above named Defendant, and against the above named Plaintiff.

The motion first herein named will be based upon the pleadings, all the files, records and proceedings herein, including the case heretofore proposed, and upon the statutes in such case made and provided.

The motion last herein named will be based upon all the pleadings, all the files, records and proceedings herein, upon the case as settled and allowed by the Court, including the Exhibits mentioned therein, but not attached, together with this Notice, and upon the statutes in such case made and provided, and upon the following further grounds:

First. Because said verdict is not supported or justified by the evidence;

Second. Because said verdict is contrary to law;

Third. Because said verdict is contrary to the evidence;

Fourth. Because the Court should have granted the motion of the Defendant made at the close of all the evidence at said trial, to direct a verdict in favor of the above named Defendant, and against the above named Plaintiff, for the following reasons, to-wit:

Because the evidence in the case failed to show any actionable negligence on the part of the Defendant;

Because the evidence in the case failed to show any action- [fol. 337] able negligence upon the part of the Defendant, which was the proximate cause of the injury and death of Roy C. Rambo;

Because as a matter of law, the Deceased, Roy C. Rambo, assumed the risk which in any manner whatsoever caused, induced or contributed to his accident and death;

Because said Roy C. Rambo, deceased, violated the rules of the Defendant, barring a recovery;

Because the said Roy C. Rambo, deceased, was guilty of negligence, which was the sole cause of his accident and death;

Because the evidence in the case failed to show any violation of the Federal statutes, including the Federal Boiler Inspection Act, which in any manner whatsoever proximately caused the accident and death of said Roy C. Rambo;

Because the said Roy C. Rambo, deceased, was not within the class afforded protection by the Federal statutes, including the Federal Boiler Inspection Act;

Because the evidence does not sustain or justify a verdict for the Plaintiff, and required a verdict for the defendant.

Dated at Saint Paul, Minnesota, this 13th day of July, 1934.

Stearns, Stone & Mackey, Attorneys for Defendant,
928-38 Minnesota Building, Saint Paul, Minnesota.

[fol. 338] In District Court of Dakota County

Order Denying Motion for Judgment, etc.

The above entitled matter came on for hearing before this Court on a notice of motion for judgment notwithstanding the verdict, or for a new trial; and Messrs. H. E. Stassen and Elmer J. Ryan appeared as attorneys for plaintiff, and Messrs. Stearns, Stone & Mackey appeared as attorneys for defendant; and the matter having been argued and submitted, and the Court having duly considered the same, on this 4th day of March, it is

Ordered, that said motion be, and hereby is, in all things, denied.

Let a stay of twenty (20) days be entered.

W. A. Schultz, District Judge.

IN DISTRICT COURT OF DAKOTA COUNTY

JUDGMENT

The above entitled action came on duly to be tried by the court and a jury duly empanelled and sworn on the 23rd day of May, 1934. H. E. Stassen and Elmer J. Ryan appeared as attorneys for the plaintiff; and Stearns, Stone and Mackey as attorneys for the defendant. The Court, having heard said action and submitted the same to said jury and said jury having rendered its verdict thereon on the 26th day of May, 1934.

[fol. 339] Now Therefore, pursuant to said verdict and on motion of said attorneys for the plaintiff,

It Is Hereby Ordered and Adjudged, that the plaintiff recover of the defendant the sum of the verdict of $15,000.00 and the interest thereon in the amount of $750.00 and $50.72, costs and disbursements in said action taxed and allowed as follows:

Principal sum of verdict		$15,000.00
Interest since verdict		750.00
Total of verdict and interest		$15,750.00
Statutory costs allowed	$10.00	
Fees and mileage of witnesses	36.72	
Fees of clerk of court	4.00	
Total costs and disbursements		$50.72
Total amount of judgment		$15,800.72

Dated March 28th, 1935.

T. S. Ryan, Clerk.

[fol. 340] IN DISTRICT COURT OF DAKOTA COUNTY

NOTICE OF APPEAL TO SUPREME COURT

To the Plaintiff above named and to Messrs. Stassen & Ryan, her attorneys, and to T. S. Ryan, Esq., clerk of the above named court:

You, and each of you, will please take notice that the above named defendant, Chicago Great Western Railroad

Company, now appeals to the Supreme Court of the State of Minnesota from that certain judgment, and the whole thereof, entered and docketed in the above entitled matter, in favor of the above named plaintiff and against the above named defendant, on the 28th day of March, 1935, for the sum of Fifteen Thousand Eight Hundred and 72/100 Dollars ($15,800.72).

Dated at St. Paul, Minnesota, this 29th day of March, 1935.

Stearns, Stone & Mackey, Attorneys for Defendant,
928-938 Minnesota Bldg., St. Paul, Minnesota.

(Served March 29, 1935 on Stassen & Ryan and clerk of District Court.)

Undertaking to pay cost on appeal.

(Approved by Judge Schultz March 29, 1935, in the sum of $250.)

[fol. 341] IN SUPREME COURT OF MINNESOTA

30480

MARY RAMBO, as Administratrix of the Estate of Roy C. Rambo, Deceased, Respondent,

vs.

CHICAGO GREAT WESTERN RAILROAD COMPANY, a Corporation, Appellant

ASSIGNMENTS OF ERROR

The Appellant filed the following Assignments of Error: The District Court of Dakota County, Minnesota, erred:

1. In denying defendant's motion made at the close of the evidence in the case for a directed verdict in favor of defendant (page 293 of record).

2. In denying defendant's motion for judgment notwithstanding the verdict (pp. 335-338 of Record).

3. In entering judgment in favor of the plaintiff (p. 338 of Record).

4. In charging the jury that the provisions of the Federal Boiler Inspection Act could be considered in this case and

that the defendant might be found liable thereunder (p. 297, et seq. of Record.)

[fol. 342] [File endorsement omitted]

IN SUPREME COURT OF MINNESOTA, DAKOTA COUNTY

No. 239

J. J. Olson, J. Dissent, Holt, J.

30480

MARY RAMBO, as Administratrix, etc., Respondent,

vs.

CHICAGO GREAT WESTERN RAILROAD CO., Appellant,

Syllabus

1. The only act of negligence submitted to the jury in this action for wrongful death of plaintiff's intestate was a violation of the Federal Boiler Inspection Act with respect to the headlight of the locomotive which overtook and ran him down as he was traveling after dark on a gasoline speeder, he being in the employ of defendant and both engaged in interstate traffic. It is held, the evidence supports the verdict that there was a violation of the act, and that such violation caused or contributed to cause the death of plaintiff's intestate.

2. The evidence sustains the conclusion of the jury that the negligence of the deceased was not the sole cause of his death.

Affirmed.

[fol. 343] OPINION—Filed Nov 1, 1935

JULIUS J. OLSON, Justice:

Plaintiff recovered for the death of her husband by defendant's wrongful act. It moved for judgment non ob-

stante, but not for a new trial. It appeals from the judgment.

Plaintiff's decedent, Roy C. Rambo, had for many years been in the employ of defendant as a signal maintainer of its tracks and, for some time prior to and up to the moment of his death, had charge of defendant's track from Empire to Dennison, residing at Randolph, north of Dennison. He used a gasoline speeder in his work. He was run down three and a half miles south of Hampton by defendant's passenger train that passed Hampton at 5:05 P. M. December 8, 1933. He was seen leaving Hampton going south at about 4:45 P. M. The train was running at a speed of 60 miles an hour. It was a dark cloudy evening. The sun set at 4:30 o'clock. The ground was bare. The engineer testified that as he was watching the straight track he discovered something moving thereon when at a distance therefrom of from seven to nine coach lengths. A coach length is fifty feet. He took it to be a couple of dogs. When he came within five or six coach lengths of the moving object, he saw it was a man on a speeder and at once applied the emergency brakes and sounded the whistle repeatedly. There was a down grade of eight-tenths of a foot per hundred feet at the place, and the train ran some 2300 feet beyond the point where it struck and crushed the speeder before it could be stopped. Where Rambo was overtaken, and for some distance both to the north and south, the track is on an embankment or fill. The train was late. It left St. Paul seven minutes late, and at Rich Valley, sixteen miles out of St. Paul, it struck a truck at a highway crossing, killing two [fol. 344] men. In that accident it lost the pilot of the locomotive, and caused a delay of 40 or 45 minutes. The pilot was not replaced. The operation of the locomotive without a pilot was one of the acts of negligence alleged in the complaint. It was conceded that the train was engaged in interstate transportation and that Rambo was so employed at the time of the fatal accident.

Of the several acts of negligence pleaded the trial court ruled that the proof warranted the submission of one only, the alleged failure to equip the locomotive with a headlight of the illuminating power required by the federal law, which law, as declared by the federal courts, must govern this case, for both employer and employe were engaged in interstate commerce at the time of the fatality. The statutes re-

ferred to are generally known as the Federal Employers' Liability Act U. S. C. A., c. 2, §§ 51-59, and the Boiler Inspection Act as amended June 7, 1924 (45 U. S. C. A., c. 1, §§ 22-34). Section 23 reads:

"It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, * * *."

Under the provisions of the last named act the following rule (No. 129) pertaining to headlights on locomotives was in force in December, 1933:

"Each locomotive used in road service between sunset and sunrise shall have a headlight which shall afford sufficient illumination to enable a person in the cab of such locomotive who possesses the usual visual capacity required of locomotive engineers to see in a clear atmosphere, a dark object as large as a man of average size standing erect at a [fol. 345] distance of at least 800 feet ahead and in front of such headlight; and such headlight must be maintained in good condition."

Since there was no motion for new trial the assignments of error reach only the question whether there is any substantial evidence in support of the judgment. As stated, the sole act of negligence upon which the jury could base a recovery, under the charge of the court, was a violation of the quoted rule as to headlight; and, if defendant was negligent in that respect, is there sufficient evidence that the deficient headlight was the proximate cause of Rambo's death? The quantum of proof must measure up to the rule clearly and adequately stated in Baltimore & Ohio R. R. Co. v. Groeger, 266 U. S. 521, 69 L. ed. 419, with marginal citation of prior decisions of the court. It is true, that there is direct proof that the headlight was inspected at the time the locomotive was attached to the train in Minneapolis, and when it arrived at its destination at Oelwein, Iowa, and that it then satisfied the requirement of rule 129; also that it was burning brightly when the train passed Hamp-

ton and shortly after the accident when the chief electrician of defendant, who happened to be on the train, having walked to the front thereof when the emergency stop was made, ascertained, and so testified at the trial, that the track ahead was illuminated properly for more than 800 feet. But this notwithstanding, we think there are facts testified to which authorized the jury in finding that the headlight did not comply with the standard fixed under the Boiler Inspection Act. Most persuasive of this is the testimony of the engineer himself, who testified that he was watching the straight track ahead but could see no object thereon until he was within 500 feet of what he took to be a couple of dogs, and not until he came 100 or more feet nearer could he make out that it was a man on a speeder. There is no sug- [fol. 346] gestion that the engineer did not have the visual capacity required of locomotive engineers. The fact that Rambo was seen to make no move to leave the speeder indicates that the headlight did not cast its rays sufficiently around where he was so as to give warning of the approach of the train. There is evidence to show that a person on a running speeder can quickly and without great danger swing himself clear of the rails. Then there is the testimony of a 15 year old lad, who lived adjacent to the track where Rambo was run down and who witnessed the accident, that while he heard a speeder coming he could not see it until the train which he heard and saw approaching came within about 100 feet of the speeder, when the headlight disclosed its presence to him, and that, when he heard the blasts of the whistle and saw the sparks from the application of the brakes, the locomotive was less than 50 feet from the speeder. It is thought the testimony of the engineer that the illumination of the headlight was so deficient that he could not ascertain what the object ahead of him on the track was until he was within 300 feet thereof, corroborated by the fact that the rays of light were not sufficient to arouse the attention of Rambo to the presence of the locomotive, and the testimony of the lad, who witnessed the accident standing a few rods from the track, that he, although knowing that both train and speeder were approaching, could not see the speeder until the headlight was within 100 feet thereof, justify the jury in finding that the headlight did not comply with the requirements of the boiler inspection act.

We do not doubt that if the headlight violated that act, the evidence warranted the jury in concluding that such violation or negligence caused or contributed to cause Rambo's death. A case in point on the proposition that the violation of the regulation as to headlight might be the proximate cause of an employe's death is Chesapeake & Ohio Ry. Co. v. [fol. 347] Wood, 59 Fed. (2d) 1017. The headlight of a locomotive in the night time is not only to disclose obstructions on the track that might imperil the train, but also to give warning to employes and others of the approach of the train. It is readily seen that if the engineer had clearly seen Rambo when he was 800 feet or more away, he might have been able to so reduce the speed that it would have been slower than that of the speeder and thus avoided contact or that decedent could have swung himself clear from the rails. It is also well known that a bright light coming up behind one traveling in the dark warns such a one of the approach of the carrier of the light. The jury therefore have concluded that had the headlight complied with the law Rambo would have thereby been warned of his danger in time to escape; hence, that the violation of the law, or defendant's negligence in that respect, was a proximate or contributing cause to Rambo's death.

Defendant insists that Rambo's negligence in not carrying lanterns on the speeder as its rules require, which rules in printed form Rambo had, and also in failing to ascertain from the agent at Hampton before he left for Randolph whether the track would be free from trains was the proximate cause of his death. The court charged the jury that if Rambo's negligence was the sole cause of his death the verdict should be for defendant. Evidently the jury found that his negligence was not the sole cause, and it could not well have been so found, if the evidence warranted a finding that a defective headlight was a proximate or contributing cause. 45 U. S. C. A., §§ 7 and 53, provide that contributory negligence and assumption of risk do not afford defenses in actions for wrongful death where the carrier's violation of any statute enacted for the safety of the employe contributed to the death. Rambo was not in the act of violating any order or direction of the employer respect- [fol. 348] ing the headlight of this train, and, in traveling on the speeder after dark without lanterns lit thereon, was violating no federal statute. So cases like Great Northern

Ry. Co. v. Wiles, 240 U. S. 444, 60 L. Ed. 732, have no application, as stated in Union Pacific Railroad Co. v. Hadley, 246 U. S. 330, 62 L. Ed. 751.

We conclude that defendant was not entitled to a directed verdict and should not have judgment notwithstanding.

The judgment is affirmed.

Mr. Justice Stone did not sit.

DISSENTING OPINION

HOLT, Justice:

For the reason that the evidence seems conclusive that the headlight complied with the Federal Boiler Inspection Act, I am unable to concur in the foregoing opinion.

[fol. 349] IN SUPREME COURT OF MINNESOTA

[Title omitted]

PETITION FOR REARGUMENT—Filed Nov. 7, 1935

The appellant respectfully petitions the Court to grant a reargument in the above entitled appeal for the following reasons:

I

The following language in the opinion is not in accordance with the record, to-wit:

"Most persuasive of this is the testimony of the engineer himself, who testified that he was watching the straight track ahead but could see no object thereon until he was within five hundred feet of what he took to be a couple of dogs, and not until he came one hundred or more feet nearer could he make out that it was a man on a speeder."

The engineer did not say that he could see no object thereon until he was within five hundred feet of what he took to be a couple of dogs. What he said was that he did not see any object until he was within "eight or nine car lengths—eight—probably seven."

[fol. 350] The Court has overlooked the argument that the engineer did not testify that he was looking as far ahead as eight hundred feet, nor does the evidence that the engi-

neer did not see the speeder until he was within seven or eight car lengths prove that the engineer could not have seen it if he had been looking farther ahead. Looking ahead seven or eight car lengths, as the moving object came within the fringe of his vision, it appeared to be a couple of dogs, and when it came within direct line of his vision, he made out that it was a speeder. The evidence proves that the engineer was not looking as far ahead as eight hundred feet. It does not prove that he could not see eight hundred feet ahead, if his gaze had been directed that far ahead.

We quote from the record:

"I saw something down on the track. At first when I noticed it, I thought it was a dog or two running down the track; when I got a little closer I discovered it was a speeder and I pulled the whistle. I gave a number of short blasts and the man on the speeder never turned or looked."

"Q. How far ahead on the track was the object when it appeared to be a couple of dogs?

"A. It might have been eight or nine car lengths—eight —probably seven.

"Q. Seven, eight, or nine car lengths?

"A. Yes.

"Q. By that you mean railroad car lengths?

"A. Yes.

"Q. What did you do at that time?

"A. I was watching ahead to see what it was and discovered it was a speeder."

* * * * * * *

"Q. How far ahead of you was this object when you discovered it to be a speeder?

"A. About five or six car lengths.

"Q. By car lengths you mean railroad cars?

"A. Yes.

* * * * * * *

[fol. 351] "Q. Were you looking ahead immediately before you saw what appeared to be a couple of dogs?

"A. Absolutely.

"Q. Were you looking ahead at all times from the time you rounded the curve until you hit the speeder?

"A. Yes."

II

The opinion of the Court contains the following statement:

"The fact that Rambo was seen to make no move to leave the speeder indicates that the headlight did not cast its rays sufficiently around where he was so as to give warning of the approach of the train."

That fact does not so indicate. Rambo made no move to leave the speeder at any time. When the train was within five hundred feet of him, and when the engineer first saw him, and from that time on, while the headlight was full upon him, he made no move to leave the speeder. The fact that he was seen to make no move to leave the speeder indicates that no kind of a headlight would have warned him. If Rambo would [illegible] a move to leave the speeder at eight hundred feet, he [illegible]rtainly would make a move to leave the speeder at five hundred feet had he not been entirely indifferent to his situation.

III

The opinion contains another mistake as to the record:

"Then there is the testimony of a fifteen year old lad who lived adjacent to the track where Rambo was run down, and who witnessed the accident, that while he heard a speeder coming he could not see it until the train which he heard and saw approaching came within about one hundred feet of the speeder when the headlight disclosed its presence to him."

This boy testified, at Folio 305, that after he heard the speeder and heard the train he looked away from the track. [fol. 352] He "looked toward the cornstalks to see if there was a chicken there" (306). Then when he looked back again at the track he saw the speeder. He never testified at any time that he could not see the speeder until the train came within one hundred feet of it. Had he been watching instead of looking for the chicken, he undoubtedly would have seen the speeder sooner.

IV

We do not agree with the following statement of the opinion:

"The jury could, therefore, have concluded that had the headlight complied with the law, Rambo would have thereby been warned of his danger in time to escape."

If this man would make no move to jump off a speeder at a distance of five hundred feet, when the light was full upon him, he certainly would have made no effort to jump off at eight hundred feet.

This petition for rehearing is presented with all due respect to the Court. We believe that further arguments will induce the Court to change its opinion as to the proof of insufficiency of the headlight. We believe that it is only fair to this Court to apply for a rehearing before applying to the Supreme Court of the United States for a Writ of Certiorari.

Respectfully submitted, Stearns, Stone & Mackey, Attorneys for Defendant-Appellant, 928-938 Minnesota Bldg., St. Paul, Minnesota.

[File endorsement omitted.]

[fol. 353] IN SUPREME COURT OF MINNESOTA

[Title omitted]

ORDER DENYING PETITION FOR REARGUMENT—Nov. 14, 1935

Ordered, that the petition for reargument herein be and the same hereby is denied and stay vacated.

IN SUPREME COURT OF MINNESOTA

30480

MARY RAMBO, as Administratrix of the Estate of Roy C. Rambo, Deceased, Respondent

vs.

CHICAGO GREAT WESTERN RAILROAD COMPANY, a Corporation, Appellant

JUDGMENT

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the [fol. 354] judgment of the Court below, herein appealed

from, to-wit, of the District Court within and for the County of Dakota be and the same hereby is in all things affirmed.

And it is further determined and adjudged that respondent herein, do have and recover of appellant herein, the sum and amount of Sixty and 20/100 Dollars ($60.20) costs and disbursements in this cause in this Court, and that execution may be issued for the enforcement thereof.

Dated and signed Nov. 14, 1935.

By the Court.

Attest.

Russell O. Gunderson, Clerk.

Statement for Judgment:

Statutory Costs	$25.00
Printer	35.20
Total	$60.20

Clerk's certificate to foregoing paper omitted in printing.

[fol. 355] IN SUPREME COURT OF MINNESOTA

[Title omitted]

ORDER STAYING PROCEEDINGS—Filed Nov. 14, 1935

Whereas The appellant intends to apply to the Supreme Court of the United States for a Writ of Certiorari.

Now, therefore, it is hereby ordered That all proceedings in the above entitled matter be and the same are hereby stayed pending the decision of the Supreme Court of the United States upon the appellant's petition for a Writ of Certiorari, and, should the Supreme Court of the United States grant a Writ of Certiorari to review the judgment of this Court herein, then all proceedings herein shall be, and the same hereby are stayed until the final determination of the Supreme Court of the United States on such Writ of Certiorari.

Dated November 14, 1935.

(Signed) John P. Devaney, Chief Justice, Supreme Court of Minnesota.

[File endorsement omitted.]

[fol. 356] IN SUPREME COURT OF MINNESOTA

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed Dec. 5, 1935

To the Clerk of the Supreme Court of the State of Minnesota:

You Are Hereby Requested to make a transcript of the record of this cause to be used in an application to the Supreme Court of the United States for a Writ of Certiorari in said cause, the transcript to consist of:

The record on appeal in said cause;
Assignments of error;
The opinion of the Supreme Court of the State of Minnesota;
The petition for re-argument;
The Order of the Supreme Court of Minnesota denying the petition for re-argument;
The final judgment and decision of the Supreme Court of the State of Minnesota;
The Order of the Supreme Court of the State of Minnesota staying proceedings;
This Præcipe;

[fol. 357] Your certificate to the record that it is a complete record in said cause.

Dated this 3rd day of December, 1935.

Stearns, Stone & Mackey, Attorneys for C. G. W. R. R. Co., Appellant, 928-938 Minnesota Bldg., St. Paul Minnesota.

Due and personal service of the within Præcipe is hereby admitted this 3rd day of December, 1935.

H. E. Stassen and Elmer J. Ryan, Attorneys for Plaintiff-Respondent.

[File endorsement omitted.]

[fol. 358] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 359] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed February 17, 1936

The petition herein for a writ of certiorari to the Supreme Court of the State of Minnesota is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 40,250. Minnesota Supreme Court. Term No. 696. Chicago Great Western Railroad Company, petitioner, vs. Mary Rambo, as Administratrix of the Estate of Roy C. Rambo, deceased. Petition for a writ of certiorari and exhibit thereto. Filed January 13, 1936. Term No. 696, O. T., 1935.

(7480-C)

FILE COPY

No. 696

FILED
JAN 13
CHARLES ELMORE

IN THE

Supreme Court of the United States

October Term 1935.

CHICAGO GREAT WESTERN RAILROAD COMPANY, a corporation,

Petitioner,

vs.

MARY RAMBO, as administratrix of the Estate of ROY C. RAMBO, deceased,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA AND BRIEF IN SUPPORT THEREOF.

HARRY S. STEARNS,
RALPH A. STONE,
PHILIP J. MACKEY,
Attorneys for Petitioner,
928 Minnesota Building,
St. Paul, Minnesota.

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IN THE

Supreme Court of the United States

October Term 1935.

CHICAGO GREAT WESTERN RAILROAD COMPANY, a corporation,

Petitioner,

vs.

MARY RAMBO, as administratrix of the Estate of ROY C. RAMBO, deceased,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

Now comes the Chicago Great Western Railroad Company and presents this, its petition for a Writ of Certiorari, to be issued to the Supreme Court of the State of Minnesota to review the judgment entered therein on the 14th day of November, 1935 in the above entitled cause, affirming a judgment in the amount of $15,800.72 entered by the District Court of Dakota County, Minnesota, on the 28th day of March, 1935, in favor of the respondent and against the petitioner in an action brought by said respondent against the petitioner to recover damages for the death of Roy C. Rambo, deceased intestate.

A duly certified copy and ten uncertified copies of the entire record, including all the proceedings in the District Court of Dakota County, Minnesota, where said cause was tried, and in the Supreme Court of the State of Minnesota, to which an appeal was taken from the judgment of said District Court, are filed herewith under separate cover, and your petitioner respectfully shows to the Court:

(Figures in parenthesis refer to pages of the printed record.)

STATEMENT OF QUESTIONS PRESENTED.

The questions presented in this case are:

1. Whether there was sufficient evidence to sustain a finding of a violation of the Federal Boiler Inspection Act (U. S. C. A. Title 45, Sec. 23; Act of June 7, 1924; c. 355, Sec. 2, 43 Stat. 659) where the only evidence of a defective headlight in violation of said Act was the testimony of the engineer that he did not see deceased within 800 feet, and where it was not shown that the engineer was looking 800 feet ahead of the engine, and where the headlight was shown to be in perfect condition in compliance with the Act before and immediately after the accident.

2. Whether, even if the headlight were defective, it was the proximate cause of the accident.

3. Whether the negligence of the deceased employe was not the sole cause of his injury.

STATUTES INVOLVED.

The statutes involved are the Federal Boiler Inspection Act, to-wit: U. S. C. A., Title 45, Sec. 23, Act of June 7, 1924, c. 355, Sec. 2, 43 Stat. 659, reading as follows:

> "It shall be unlawful for any carrier to use or to permit to be used on its line any locomotive unless said lo-

comotive, its boiler, tender, and all parts and appurtenances thereof, are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive and its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of Sections 28, 29, 30 and 32, and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for,"

And,

The rule of the Interstate Commerce Commission, adopted pursuant to the provisions of said Act, reading as follows, to-wit:

(Rule 29, R. 297 & 310).

"Locomotives used in road service—Each locomotive used in road service between sunset and sunrise shall have a headlight which shall afford sufficient illumination to enable a person in the cab of such locomotive, who possesses the usual visual capacity required of locomotive enginemen to see in a clear atmosphere a dark object as large as a man of average size, standing erect, at a distance of at least 800 feet ahead and in front of such headlight, and such headlight must be maintained in good condition."

And,

The Federal Employers Liability Act, to-wit, the Act of April 22, 1908, Chap. 149, Sec. 1, 35 Stat. 65, U. S. C. A. Title 45, Sec. 51, reading as follows:

"Every common carrier by railroad, while engaged in commerce between any of the several states or territories, or between any of the states and territories, or between the District of Columbia and any of the states

or territories, or between the District of Columbia or any of the states or territories, and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employe, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employe * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employes of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

SHORT SUMMARY STATEMENT OF THE FACTS.

Deceased, Roy C. Rambo, was a signal maintainer for the Railroad Company stationed at Randolph, Minnesota (R. 13). He was killed on December 8, 1933 at 5:10 p. m. by reason of a locomotive striking the motor car or speeder on which he was riding on the track. He was engaged in interstate commerce (R. 22).

Mr. Rambo had a section of the tracks to look after whereon it was his duty to maintain the electric signals, crossing bells, and telephone (R. 225). He operated a motor car on the track "with the understanding that trains may be run at any time upon any track in either direction" (R. 316). He was also instructed by the rules of the company not to operate his motor car "at night except when necessary", and that "in such cases a white and red light must be displayed, visible from both directions. A red and white lantern must be kept on motor cars ready for use at all time" (R. 321-323).

Rambo disobeyed these instructions. He had left his red and white lanterns in his tool house and had no lanterns on his car at the time he was killed (R. 207-208).

Rambo's hours of work were from 8:00 a. m. to 5:00 p. m. (R. 226). It was his duty to get a line-up of trains at 8:00 a. m. and 1.00 p. m., which were good for one hour only. After that if he made a move it was his duty to get a line-up before doing so (R. 226, 227). It was his duty before going on the track at all "to assure himself that all trains and sections due have passed. No notice will be given of extra trains and employes must protect themselves as prescribed by the rules" (R. 322-327).

At the time of his death, Mr. Rambo also violated these instructions. He failed to get a line-up on the train that killed him before he started out on the track, although he should have known that it had not passed (R. 242-243). Passenger train No. 8 was due to pass Hampton going South at 4:12 p. m. It had not passed at 4:55 p. m. At that time the deceased was seen at that station starting his motor car to go South toward Randolph where he lived. There was a telephone in the station at Hampton (R. 135). Rambo was not more than fifteen feet from it (R. 138). He could have communicated instantly with the train dispatcher before he left Hampton. It was his duty to do so. The station agent realizing that he was about to start out and that he had not gotten information as to trains, as it was his duty to do, ran out to warn him, but by the time he got there deceased was on his way (R. 128-133).

At 5:05 p. m. Train No. 8 passed Hampton 53 minutes late (R. 134). It had been delayed by an earlier mishap. It overtook the motor car travelling ahead of it in the same direction with the fatal result. The engineer testified:

> "I saw something down on the track; at first when I noticed it, I thought it was a dog or two running down the track. When I got a little closer I discovered it was a speeder, and I pulled the whistle. I gave a number of

short blasts and the man on the speeder never turned or looked" (R. 74).

The train was going 60 miles per hour (R. 80). The engineer tooted the whistle a number of times and set his emergency brake (R. 80). The accident happened on a straight track. It was straight for a mile or more before the point where the speeder was struck (R. 76).

The engineer testified that he was looking ahead; that he first saw the car when it was seven to nine car lengths ahead of him (R. 74). He afterwards said it might have been a thousand feet, more or less (R. 248). He did not say how far ahead he was looking. There was no evidence from any person in the engine cab that the light would not reveal a person standing erect at a distance of 800 feet if the person's eyes were directed at a point 800 feet ahead.

The only question submitted to the jury as to the negligence of the Railroad Company was whether it had complied with the law with reference to the headlight on the engine (R. 297).

There was no proof whatever offered by plaintiff as to the defective condition of the headlight. It was a standard headlight (R. 180)—a type purchased after a thorough test to see if they complied with the rule of the Interstate Commerce Commission (R. 180-181).

This particular headlight was checked by the chief electrician of the railroad company immediately after the accident and found to comply with the requirements (R. 179). The headlight was then burning brightly. There were no spots on it (R. 182). The light as then burning revealed a telegraph pole 1000 feet ahead of it (R. 182-183).

The headlight was inspected when the engine arrived at Oelwein, Iowa, and found to be in perfect condition (R.

199). It had not been touched in the meantime. It was inspected before the train left Minneapolis and found to be in perfect condition (R. 193-194).

RULINGS OF COURTS BELOW.

The District Court of Dakota County, Minnesota, held that there was evidence sufficient to go to a jury on the question whether the headlight violated the rule of the Interstate Commerce Commission and hence the Federal Boiler Inspection Act. It denied the motion of your petitioner for a directed verdict in its behalf (R. 293), and then charged the jury as follows:

> "It is the law for you to pass upon, not saying that the Railroad Company was negligent, but it is for you to consider:
>
> 'It shall be unlawful for any carrier, that is the Railroad Company, to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof, are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb.'
>
> 'It is also the law that the Interstate Commerce Commission may designate certain rules that the railroad must comply with in order to comply with this law. The Interstate Commerce Commission, Bureau of Locomotive Inspection, has passed a rule known as Rule No. 129, which reads as follows:
>
> > 'Each locomotive used in road service between sunset and sunrise shall have a headlight which shall afford sufficient illumination to enable a person in the cab of such locomotive who possesses the usual visual capacity required of locomotive engine men, to see in a clear atmosphere, a dark object as large as a man of average size standing erect at a

distance of at least eight hundred feet ahead and in front of such headlight; and such headlight must be maintained in good condition.'

"Plaintiff claims this headlight did not comply with the law and that rule, and because it did not comply with that law and rule that that was the proximate cause of the injury to Roy C. Rambo.

"The Railroad Company claims that this rule and the law with reference to headlights was complied with in every respect, and that there was nothing the matter with the headlight. The Railroad Company also claims that, even assuming the headlight was defective to some extent or entirely, that that was not the proximate cause of the accident; that the proximate cause of the accident was the failure of Roy C. Rambo to observe and obey the rules which they had promulgated for running and operating a speeder, and particularly with reference to keeping and maintaining lights on it and getting the line-ups of trains and seeing that the track was clear. The railroad company claims that this was the sole cause of the accident to Roy C. Rambo" (R. 297-298).

The District Court of Dakota County, Minnesota, denied the motion of your petitioner for judgment notwithstanding the verdict of $15,000, which was returned in favor of the respondent (R. 335-338).

Judgment was entered in favor of respondent (R. 338) and an appeal was taken to the Supreme Court of Minnesota.

The Supreme Court of Minnesota affirmed the rulings of the trial court. The opinion of the Supreme Court of Minnesota is found on pages 342-348 of the Record (263 N. W. 112) wherein the Court held:

"The only act of negligence submitted to the jury in this action for wrongful death of plaintiff's intestate

was violation of the Federal Boiler Inspection Act to inspect the headlight of the locomotive which overtook and ran him down as he was travelling after dark on a gasoline speeder, he being in the employ of defendant and both engaged in interstate traffic. It is *held* the evidence supports the verdict that there was a violation of the Act and that such violation caused, or contributed to cause, the death of plaintiff's intestate" (R. 342).

Justice Holt dissented, and his dissent is found at page 348 of the Record. He held the evidence to be conclusive that the light complied with the requirements.

A petition for re-argument (R. 349) was filed and denied (R. 353).

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT OF CERTIORARI.

Your petitioner respectfully submits that the Supreme Court of the State of Minnesota has decided a question arising under the Federal Boiler Inspection Act in a way probably not in accordance with applicable decisions of this Court, and has refused to follow the decision of this Court in the case of Chicago, Milwaukee, St. Paul & Pacific Railway Company v. Coogan, 271 U. S. 472, 70 L. Ed. 1041, wherein this Court held that it would examine the record, and, if, as a matter of law, the evidence is not sufficient to sustain a finding that the carrier's negligence was the cause of death, it would reverse the judgment; and further held that judgment for damages for wrongful death cannot be sustained where the record leaves the question of defendant's negligence in the realm of speculation and conjecture.

The question involved is an important one to interstate carriers. It is important to them to know whether when a

train strikes an employe on the track, whose duty it is to look out for himself, who is violating the rules and his instructions, and who is totally indifferent to his own safety, they can be held liable under the Federal Boiler Inspection Act on the claim that the headlight was defective merely because the engineer did not see the employe within 800 feet when it is not shown that the engineer was trying to see 800 feet ahead.

PRAYER.

WHEREFORE Your petitioner now prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of Minnesota and the Justices thereof, commanding the said Court to certify and send to this Court a full and complete record of the transcript and all of the proceedings of said Supreme Court of the State of Minnesota in this cause therein entitled, "Mary Rambo, as Administratrix of the Estate of Roy C. Rambo, deceased, Respondent, vs. Chicago Great Western Railroad Company, a corporation, Appellant—No. 30480—to the end that this cause may be reviewed and determined by this Court; and

Your petitioner prays that a certified copy of the record and proceedings in said Supreme Court, which is filed as a part of and contemporaneously with this petition, may be treated as a return to such Writ of Certiorari, and your petitioner prays that it may have such other and further remedies and relief in the premises as to this Court may seem appropriate and in conformity with law, and that judgment of the Supreme Court of the State of Minnesota in this case, and every part thereof, be reversed by this Honorable Court, and your petitioner will ever pray—

This is the first application for Writ of Certiorari in this cause.

CHICAGO GREAT WESTERN
RAILROAD COMPANY,

BY: Harry S. Stearns,

Ralph A. Stone,

Philip J. Mackey,

Attorneys for Petitioner.

STATE OF MINNESOTA,
County of Ramsey—ss.

HARRY S. STEARNS, Being duly sworn, makes oath and says that he is attorney for the petitioner in the above entitled action; that he has prepared the foregoing petition, and that the allegations therein are true as he verily believes.

HARRY S. STEARNS.

Subscribed and sworn to before me
this 2nd day of January, 1936.

ADA B. AHRENS,
Notary Public, Ramsey County, Minn.
My commission expires Dec. 21, 1940.
(Notarial Seal)

In my opinion, the foregoing Petition is well founded in law.

HARRY S. STEARNS.

IN THE

Supreme Court of the United States

October Term 1935.

CHICAGO GREAT WESTERN RAILROAD COMPANY, a corporation,

Petitioner,

vs.

MARY RAMBO, as administratrix of the Estate of ROY C. RAMBO, deceased,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

OPINION.

One opinion was delivered by the Supreme Court of the State of Minnesota filed on the 1st day of November, 1935. It appears on page 342 of the printed record, and is reported in 263 N. W. 112. Judge Holt dissented from the majority opinion, and his opinion is found on page 348 of the printed record.

JURISDICTION, APPLICABLE STATUTES, TIMELINESS.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229 (U. S. C. A., Title 28, Sec. 344-B).

The decision of the Supreme Court of Minnesota was filed on November 1, 1935. A petition for rehearing was filed on November 7, 1935 (R. 349), and denied on November 14, 1935 (R. 353). Final judgment of the Supreme Court of Minnesota was entered November 14, 1935 (R. 353), and the petition and this brief are presented within less than ninety (90) days from that date.

In the trial court it was claimed by the respondent that the evidence would support a recovery under the provisions of the Federal Boiler Inspection Act, to-wit: U. S. C. A., Title 45, Sec. 23, Act of June 7, 1924, c. 355, Sec. 2, 43 Stat. 659 (Supra, pp. 2 & 3). The trial court so held and held further that under that Act alone could any recovery be sustained. Petitioner denied these claims. Petitioner's motion for a directed verdict was denied (R. 293). A verdict for $15,000 was returned for respondent (R. 307), and petitioner's motion for judgment notwithstanding the verdict was denied by the trial court (R. 338).

Petitioner appealed to the Supreme Court of Minnesota, alleging that it had been denied a title, privilege, right, or immunity under said Act, and assigned the foregoing rulings of the trial court as error (R. 341). The State Supreme Court affirmed the judgment of the trial court (R. 342).

The decision by the Supreme Court of Minnesota was a decision by the highest court in which a decision might be had in the state.

The decision upon the question whether there was evidence sufficient to sustain a finding that the Federal Boiler Inspection Act had been violated was necessary to a determination of said cause. It was actually decided in the affirmative by the Supreme Court of Minnesota, and there was

in the case no non-federal ground broad enough to sustain the judgment.

FACTS IN BRIEF.

The facts are stated in the petition for the Writ of Certiorari on pages 4 to 7 thereof. We emphasize in addition the following facts:

There was testimony in the record of a 15-year-old boy who lived adjacent to the track. After he heard the speeder and heard the train, he looked away from the track. He looked "toward the cornstalks to see if there was a chicken there" (R. 102). Then when he looked back at the track again he saw the speeder. He never testified at any time that he could not see the speeder until the train came within 100 feet of it. His testimony has no bearing upon the question whether the headlight was defective. Attention is called to the petitioner's petition for re-argument, filed in the Supreme Court of Minnesota (R. 349-351).

SPECIFICATION OF ERRORS INTEND TO BE URGED.

The Supreme Court of Minnesota erred in affirming the judgment of the District Court of Dakota County, Minnesota, in favor of respondent and against defendant in the sum of $15,800.72, and, by so doing, holding the evidence sufficient to sustain a recovery under the Federal Boiler Inspection Act.

ARGUMENT.

I.

There was no evidence to sustain a finding of the violation of the Federal Boiler Inspection Act where the only evidence of a defective headlight on the engine was the testimony of the engineer that he did not see deceased within 800 feet ahead of the engine, and where the headlight was shown to be in perfect condition before and immediately after the accident.

The rule (R. 297-310) (Petition p. 3) requires that a locomotive shall, between sunset and sunrise, have a headlight which shall afford sufficient illumination to enable a person in the cab of the locomotive, who possesses the usual visual capacity required of locomotive engineers, to see, in a clear atmosphere, a dark object as large as a man of average size standing erect at a distance of at least 800 feet ahead and in front of such headlight. There was no proof that this headlight did not meet these requirements. Immediately after the accident it was tested by the chief electrician of the petitioner, who happened to be on the train, and it revealed the seventh telegraph pole, over 1000 feet ahead (R. 182-183). Tested before leaving Minneapolis, it was found in perfect condition (R. 193-194), and was in perfect condition on arrival at Oelwein, Iowa (R. 199).

Because the engineer said that when he first saw the moving object in front of him it might have been seven, eight, or nine car lengths ahead of him (R. 74), or perhaps one thousand feet (R. 248), respondent claimed it could be inferred that the headlight was defective. He could not have known how far it was away when he first saw it because he was on

an engine moving 60 miles per hour, overtaking another object moving in the same direction. His minimum estimate of seven car lengths was manifestly only a guess. It was pure conjecture, whether or not the engineer first saw the speeder in less than 800 feet, but if it was less than 800 feet before he discovered the speeder, no proof is made out of a defective headlight.

The rule requires a headlight that will reveal a man standing erect at a distance of 800 feet. The rule assumes that if both man and engine are standing still, the man should be revealed at 800 feet. If that test is met, the rule is complied with. It is not shown to be violated because the man on the engine did not see the railroad speeder with a man sitting on it and moving in the same direction.

There was no proof that, although the engineer was looking ahead, his eyes were fixed on a point 800 feet ahead. His gaze may have been directed to a point 200 feet in front of the engine or 500 feet in front of the engine, or immediately in front of the engine. To make any proof of a defective headlight, plaintiff must first prove that the engineer's eyes were fixed on a point 800 feet ahead. There was no such proof.

Even making the unproven assumption that the engineer's eyes were fixed on a point not less than 800 feet ahead (which is a pre-requisite to any claim that the headlight was proven to be defective), still the proof fails to sustain any claim of a defective headlight.

The test is whether the headlight on a standing engine will disclose a man standing 800 feet ahead. Proof that at a speed of 60 miles per hour, an engineer would not discover a man sitting on a moving speeder, does not show a failure to meet the test because of the dissimilarity of the condi-

tions. Another pre-requisite would be necessary to such proof. It would be necessary to prove that a man on a moving speeder was just as visible an object to a man on a moving train as a man standing erect on the track. The eye does not pick up an object moving away from it at night as quickly as an object standing still. At least the burden was upon the plaintiff to prove that it did. This was not done. Proof of failure to see a moving speeder with a man sitting on it, at 800 feet, is not proof that the headlight would not reveal a man standing erect at that distance, because:

(1) There was no proof that the eyes of the engineer were fixed upon the spot as far ahead as 800 feet, and

(2) There was no proof that the moving speeder with a man sitting on it was as visible as a man standing erect on the track.

To say that this light did not comply with the test is the purest speculation in this case. The respondent wholly failed to prove any violation of the Federal Boiler Inspection Act. Respondent failed to show at what distance a man standing erect could be seen with this light. The rule is not shown to be violated because a moving object, close to the ground, with a man sitting on it, is not seen sooner by an engineer who is not shown to be looking as far as 800 feet ahead.

II.

Even if the headlight were defective, it was not the proximate cause of the accident.

A train traveling 60 miles per hour strikes a railroad motor car traveling ahead of it at night. The engineer does not see the car until it is too late to avoid striking it. The negli-

gence of the engineer is out of the case by the Court's charge. He is not to be found negligent because he did not see the car. He did everything in his power to avoid the accident after he discovered the peril—that is conceded.

The doctrine of last clear chance does not apply in an action of this kind until it appears that the engineer actually saw the deceased and knew of his peril. It conclusively appears that the engineer did everything in his power to avoid the accident.

The claim of negligence is not that the engineer could have seen the deceased sooner with a different light. The claim is that the deceased might have seen a more powerful light and been warned thereby. But of this there is no proof. It is nothing more than surmise. Even if the candle power of the light had been one or two greater, it does not follow logically that the deceased would have been warned thereby, any more than with a weaker light. He was regardless of his own safety. He went out on the track without ascertaining if a train was coming. It was his duty to do so. He did not hear warning blasts of the whistle which were given in plenty of time so that he could have jumped out of the way (29, 74). "He never turned or looked" (74).

How then can it be assumed that he would have been warned by a little brighter light. Such conjecture does not reach the dignity of proof.

The uncontradicted proof is that the train would have struck deceased anyway, even if the engineer discovered deceased at a distance of 800 feet. There is no proof that he did not discover him before within 800 feet. But even if he did not, it makes no difference. Just discovering him at 800 feet the train would have struck the motor anyway. At the speed the train traveled, it could not stop in less than 2,000 feet (837-843).

III.

The negligence of the deceased employe was the sole proximate cause of his death, and is, therefore, a complete defense under the Federal Act. The question of proximate cause was for the Court.

Unadilla Ry. vs. Caldine, 276 U. S. 139, 73 L. Ed. 224;
Davis vs. Kennedy, 266 U. S. 147, 69 L. Ed. 212;
Frese vs. C. B. & Q. R. R. Co., 263 U. S. 1, 68 L. Ed. 131;
G. N. vs. Wiles, 240 U. S. 444, 60 L. Ed. 732;
McCalmont vs. P. R. R. Co., 273 Fed. 231;
Certiorari denied, 260 U. S. 751, 67 L. Ed. 495;
Southern Ry. vs. Gray, 241 U. S. 333, 60 L. Ed. 1030;
C. M. & St. P. vs. Coogan, 271 U. S. 472; 70 L. ed. 1041.

That the deceased was negligent was proven beyond any question. He violated the rules. He carried no lanterns. He did not get information as to trains. He did not watch out for trains. He knew it was his duty to keep out of the way.

The Railroad Company owed deceased no duty to look out for or warn him of the approach of the train. It was his duty to look out for and keep out of the way of the train.

Connelly vs. Penn. R. Co., 228 Fed. 322;
Aerkfetz vs. Humphreys, 145 U. S. 418, 36 L. Ed. 758;
Chesapeake & Ohio vs. Nixon, 271 U. S. 218, 70 L. Ed. 914.

The Nixon case was distinguished in

Rocco vs. Lehigh Valley R. Co., 288 U. S. 275, 77 L. Ed. 743;

where (1) the accident happened on a blind curve; (2) the workman's view was obscured; (3) the train was required to

give warning when approaching the curve but failed to do so; and (4) the presence of Rocco on the track at the point should have been expected by the engineer.

In the case of Bernola vs. Penn. R. Co., 68 Fed. (2) 172, a trackman was killed by an extra unscheduled train traveling 50 miles per hour. No signals or warnings were given. The Court, following the general rule and not the exception alluded to in the Rocco case, held that the Railroad Company owed no duty to the deceased to give him any warning; that failure to give any warning whatever of the approach of the train was not negligence; that the proximate cause of the accident was the failure of Bernola to watch for the approach of trains.

The decisions in Minnesota fully sustain the argument that it was the duty of deceased to watch for trains; that failure to do so is the proximate cause; that the Company owes no duty to the trackman to warn him.

See:

May vs. C. M. & St. P. R. Co., 147 Minn. 310, 180 N. W. 218;

Greisch vs. M. St. P. & S. S. M. R. Co., 160 Minn. 83, 199 N. W. 517.

Decisions of other State Courts are to the same effect:

Dozier vs. Mo. Pac. R. Co., 176 Ark. 651, 3 S. W. (2nd) 678;

Norfolk & W. R. Co. vs. Smith, 152 Va. 165, 146 S. E. 268;

Cincinnati &c. R. Co. vs. Swann, 160 Ky. 458, 169 S. W. 886, L. R. A. 1915 C, 27.

There is no proof that a light ten times more powerful would have overcome the effects of the negligence of the de-

ceased. To so find is to base liability upon a mere guess. The negligence of the deceased was the sole proximate cause and defendant is not liable.

IV.

CONCLUSION.

The question is whether the courts administering the Federal laws should be required to follow the decisions of this Court with reference to the sufficiency of proof. The lower court has not done so in this case, and a review and reversal by this court is the only way in which the courts of the State of Minnesota can be made to heed the decisions of this Court. There was no more proof of liability in this case than there was in the case of C. M. & St. P. R. Co. v. Coogan, 271 U. S. 472, 70 L. Ed. 1041. The verdict of $15,000, resting upon pure speculation, will have to be paid unless this Court will review the case and reverse the lower court.

Respectfully submitted,

HARRY S. STEARNS,
RALPH A. STONE,
PHILIP J. MACKEY,
Attorneys for Petitioner.

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IN THE

Supreme Court of the United States

October Term 1935

CHICAGO GREAT WESTERN RAILROAD COMPANY, a corporation,

Petitioner,

vs.

MARY RAMBO, as administratrix of the Estate of ROY C. RAMBO, deceased,

Respondent.

BRIEF FOR PETITIONER.

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A.

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IN THE

Supreme Court of the United States

October Term 1935

CHICAGO GREAT WESTERN RAILROAD COMPANY, a corporation,

Petitioner,

vs.

MARY RAMBO, as administratrix of the Estate of Roy C. RAMBO, deceased,

Respondent.

BRIEF FOR PETITIONER.

B.

OFFICIAL REPORT OF THE OPINION IN THE COURT BELOW.

The opinion of the Supreme Court of Minnesota was filed November 1, 1935, and is reported in 263 N. W. 112. Dissenting opinion of Justice Holt reported in 263 N. W. 114.

C.

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

The jurisdiction of this Court is invoked under Section 237(b), of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 28 U. S. C. A., Sec. 344-B; 43 Stat. 937.

(Numbers in parenthesis refer to pages of the Reprinted Record.)

The decision of the Supreme Court of Minnesota was filed on November 1, 1935.

The petition for rehearing was filed on November 7, 1935 (R. 246), and denied on November 14, 1935 (R. 249).

Final Judgment of the Supreme Court of Minnesota was entered November 14, 1935 (R. 249), and the petition for writ of certiorari was presented within ninety (90) days from that date.

In the trial court it was claimed by respondent that the evidence would support a recovery under the provisions of the Federal Boiler Inspection Act, to-wit: U. S. C. A., Title 45, Sec. 23, Act of June 7, 1924, c. 355, Sec. 2, 43 Stat. 659, and under rule 29 of the Interstate Commerce Commission adopted pursuant to the provisions of said act.

The Federal Boiler Inspection Act reads as follows:

> "It shall be unlawful for any carrier to use or to permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof, are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive and its boiler, tender, and all

parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of Sections 28, 29, 30 and 32, and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for."

And the rule of the Interstate Commerce Commission adopted pursuant to the provisions of said Act, which was relied on by the respondent, reads as follows:

"Locomotives used in road service—Each locomotive used in road service between sunset and sunrise shall have a headlight which shall afford sufficient illumination to enable a person in the cab of such locomotive, who possesses the usual visual capacity required of locomotive enginemen to see in a clear atmosphere a dark object as large as a man of average size, standing erect, at a distance of at least 800 feet ahead and in front of such headlight, and such headlight must be maintained in good condition."

The respondent also relies on the Federal Employers' Liability Act, to-wit, the Act of April 22, 1908, c. 149, Sec. 1, 35 Stat. 65, U. S. C. A. Title 45, Sec. 51, reading as follows:

"Every common carrier by railroad, while engaged in commerce between any of the several states or territories, or between any of the states and territories, or between the District of Columbia and any of the states or territories, or between the District of Columbia or any of the states or territories, and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employe, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employe * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employes of such carrier, or by rea-

son of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

In the trial court it was claimed by the respondent that the evidence would support a recovery under the provisions of said Boiler Inspection Act and the above quoted rule. The trial court so held, and held further that under that act alone could any recovery be sustained. (R. 210). Petitioner denied these claims. Its motion for a directed verdict was denied (R. 208). A verdict for $15,000 was returned for respondent (R. 217), and petitioner's motion for judgment notwithstanding the verdict was denied by the trial court (R. 236-8).

Petitioner appealed to the Supreme Court of Minnesota assigning the foregoing rulings of the trial court as error, and thereby alleging that it had been denied a title, privilege, right or immunity under said act (R. 240). The State Supreme Court affirmed the judgment of the trial court. Its decision was a decision by the highest Court in which a decision might be had in the state.

The decision upon the question whether there was evidence sufficient to sustain a finding that the Federal Boiler Inspection Act had been violated was necessary to a determination of said cause. It was actually decided in the affirmative by the Supreme Court of Minnesota and there was in the case no non-federal ground broad enough to sustain the judgment.

This Court has held that it will examine the record in such a case and if, as a matter of law, the evidence is not sufficient to sustain a finding that the carrier has violated the law, it will reverse the judgment. C. M. St. P. & P. Ry. Co. v. Coogan, 271 U. S. 472, 70 L. ed. 1041.

D.

STATEMENT OF THE CASE.

Deceased, Roy C. Rambo, was a signal maintainer for the Railroad Company stationed at Randolph, Minnesota (R. 9). He was killed on December 8, 1933, at 5:10 p. m. by reason of a locomotive striking the motor car or speeder on which he was riding on the track. He was engaged in interstate commerce (R. 15).

Mr. Rambo had a section of the tracks to look after whereon it was his duty to maintain the electric signals, crossing bells, and telephone (R. 159). He operated a motor car on the track "with the understanding that trains may be run at any time upon any track in either direction" (R. 223). He was also instructed by the rules of the company not to operate his motor car "at night except when necessary", and that "in such cases a white and red light must be displayed, visible from both directions. A red and white lantern must be kept on motor cars ready for use at all time" (R. 227-228). His attention was particularly called to this rule November 13, 1928 (R. 227).

Rambo disobeyed these instructions. He had left his red and white lanterns in his tool house and had no lanterns on his car at the time he was killed (R. 146).

Rambo's hours of work were from 8:00 a. m. to 5:00 p. m. (R. 159). It was his duty to get a line-up of trains at 8:00 a. m. and 1:00 p. m. which were good for one hour only. After that if he made a move it was his duty to get a line-up before doing so (R. 160, 230, 231). It was his duty before going on the track at all "to assure himself that all trains and sections due have passed. No notice will be given of extra trains and employes must protect themselves as prescribed by the rules" (R. 227).

At the time of his death, Mr. Rambo also violated these instructions. He failed to get a line-up on the train that killed him before he started out on the track, although he should have known that it had not passed (R. 171). Passenger train No. 8 was due to pass Hampton going South at 4:12 p. m. It had not passed at 4:55 p. m. At that time the deceased was seen at that station starting his motor car to go South toward Randolph where he lived. There was a telephone in the station at Hampton (R. 92). Rambo was not more than fifteen feet from it (R. 96). He could have communicated instantly with the train dispatcher before he left Hampton. It was his duty to do so. The station agent realizing that he was about to start out and that he had not gotten information as to trains, as it was his duty to do, ran out to warn him, but by the time he got there deceased was on his way (R. 92).

At 5:05 p. m. Train No. 8 passed Hampton 53 minutes late (R. 94). It had been delayed by an earlier mishap. It overtook the motor car travelling ahead of it in the same direction with the fatal result. The engineer testified:

> "I saw something down the track; at first when I noticed it, I thought it was a dog or two running down the track. When I got a little closer I discovered it was a speeder, and I pulled the whistle. I gave a number of short blasts and the man on the speeder never turned or looked" (R. 51).

The train was going 60 miles per hour (R. 51, 55). The engineer tooted the whistle a number of times and set his emergency brake (R. 51-2). The accident happened on a straight track. It was straight for a mile or more before the point where the speeder was struck (R. 53).

The engineer testified that he was looking ahead; that he first saw the car when it was seven to nine car lengths ahead of him (R. 52). He afterwards said it might have been a thousand feet, more or less (R. 175). *He did not say how far ahead he was looking.* There was no evidence from any person in the engine cab that the light would not reveal a person standing erect at a distance of 800 feet if the person's eyes were directed at a point 800 feet ahead.

The only question submitted to the jury as to the negligence of the Railroad Company was whether it had complied with the law with reference to the headlight on the engine (R. 210, fol. 297).

There was no proof whatever offered by plaintiff as to the defective condition of the headlight. It was a standard headlight (R. 126)—a type purchased after a thorough test to see if they complied with the rule of the Interstate Commerce Commission (R. 126-7).

This particular headlight was checked by the chief electrician of the railroad company immediately after the accident and found to comply with the requirements (R. 127-8). The headlight was then burning brightly. There were no spots on it (R. 127). The light as then burning revealed a telegraph pole 1,000 feet ahead of it (R. 128).

The headlight was inspected when the engine arrived at Oelwien, Iowa, and found to be in perfect condition (R. 140). It had not been touched in the meantime. It was inspected before the train left Minneapolis and found to be in perfect condition (R. 136-7).

E.

SPECIFICATION OF THE ASSIGNED ERRORS INTENDED TO BE URGED.

1. The Supreme Court of Minnesota erred in affirming the judgment of the District Court of Dakota County, Minnesota, and thereby holding the evidence in the case sufficient to sustain a recovery for the death of the deceased under the provisions of the Federal Boiler Inspection Act.

2. The Supreme Court of Minnesota erred in affirming the trial district court of Dakota County, Minnesota, which (a) denied petitioner's motion for a directed verdict at the close of the evidence; (b) denied petitioner's motion for judgment notwithstanding the verdict; (c) entered judgment in favor of respondent; (d) charged the jury that the Federal Boiler Inspection Act could be considered in this case and that the petitioner could be found liable thereunder (R. 210-11).

F.

ARGUMENT.

There was no evidence to sustain a finding of the violation of the Federal Boiler Inspection Act where the only evidence of a defective headlight on the engine was the testimony of the engineer that he did not see deceased within 800 feet ahead of the engine, and where the headlight was shown to be in perfect condition before and immediately after the accident.

The rule (R. 211, 219) (Petition p. 3) requires that a locomotive shall, between sunset and sunrise, have a headlight which shall afford sufficient illumination to enable a person in the cab of the locomotive, who possesses the usual visual capacity required of locomotive engineers, to see, in a clear atmosphere, a dark object as large as a man of average size standing erect at a distance of at least 800 feet ahead and in front of such headlight. There was no proof that this headlight did not meet these requirements. Immediately after the accident it was tested by the chief electrician of the petitioner, who happened to be on the train, and it revealed the seventh telegraph pole, over 1000 feet ahead (R. 128). Tested before leaving Minneapolis, it was found in perfect condition (R. 136-7) and was in perfect condition on arrival at Oelwein, Iowa (R. 140).

Because the engineer said that when he first saw the moving object in front of him it might have been seven, eight, or nine car lengths ahead of him (R. 52), or perhaps one thousand feet (R. 175), respondent claimed it could be inferred that the headlight was defective. He could not have known how far it was away when he first saw it because he was on

an engine moving through the darkness at 60 miles per hour, overtaking another object moving in the same direction. His minimum estimate of seven car lengths was manifestly only a guess. It was pure conjecture, whether or not the engineer first saw the speeder in less than 800 feet, but if it was less than 800 feet before he discovered the speeder, no proof is made out of a defective headlight.

The rule requires a headlight that will reveal a man standing erect at a distance of 800 feet. The rule assumes that if both man and engine are standing still, the man should be revealed at 800 feet. If that test is met, the rule is complied with. It is not shown to be violated because the man on the swiftly moving engine did not see the railroad speeder with a man sitting on it and moving in the same direction.

There was no proof that, although the engineer was looking ahead, his eyes were fixed on a point 800 feet ahead. His gaze may have been directed to a point 200 feet in front of the engine or 500 feet in front of the engine, or immediately in front of the engine. To make any proof of a defective headlight, plaintiff must first prove that the engineer's eyes were fixed on a point 800 feet ahead. There was no such proof.

Even if the headlight were as bright as the sun, the engineer would not see an object 800 feet ahead if he were only looking 400 feet ahead. To show that the engineer didn't see 800 feet ahead is no proof that he couldn't see an object that far ahead, had his eyes been directed at a point that far in advance of him. The candle power of the headlight is not determined by proof that the engineer did not see deceased within 800 feet. As a matter of fact, the engineer did not know how far ahead of him the motor car was when he first saw it. He said first seven, eight or nine car lengths and

afterward said it might be a thousand feet (R. 52, 175). Manifestly he would not know. Sitting in the cab of an engine, moving 60 miles per hour, overtaking a motor car likewise in motion, no one could tell how far off it was when first seen. It would be only a guess at the best.

So, not only was it not proven that the engineer could not see 800 feet ahead, had his eyes been directed that far in advance, but it is also so uncertain as to amount to total lack of proof, as to the distance from which the engineer actually discovered the railroad speeder.

Even making the unproven assumption that the engineer's eyes were fixed on a point not less than 800 feet ahead (which is a pre-requisite to any claim that the headlight was proven to be defective), still the proof fails to sustain any claim of a defective headlight.

The test is whether the headlight on a standing engine will disclose a man standing 800 feet ahead. Proof that at a speed of 60 miles per hour, an engineer would not discover a man sitting on a moving speeder, does not show a failure to meet the test because of the dissimilarity of the conditions. Another pre-requisite would be necessary to such proof. It would be necessary to prove that a man on a moving speeder was just as visible an object to a man on a moving train as a man standing erect on the track. The eye does not pick up an object moving away from it at night as quickly as an object standing still. At least the burden was upon the plaintiff to prove that it did. This was not done. Proof of failure to see a moving speeder with a man sitting on it, at 800 feet, is not proof that the headlight would not reveal a man standing erect at that distance, because:

(1) There was no proof that the eyes of the engineer were fixed upon the spot as far ahead as 800 feet, and

(2) There was no proof that the moving speeder with a man sitting on it was as visible as a man standing erect on the track.

To say that this light did not comply with the test is the purest speculation in this case. The respondent wholly failed to prove any violation of the Federal Boiler Inspection Act. Respondent failed to show at what distance a man standing erect could be seen with this light. The rule is not shown to be violated because a moving object, close to the ground, with a man sitting on it, is not seen sooner by an engineer who is not shown to be looking as far as 800 feet ahead.

Respondent claims that the testimony of the witness, Nicholas Schaack, supports the finding of a defective headlight. He was a lad of 15 years (R. 66). He lived on a farm West of the Chicago Great Western Railroad track. He was out in the yard catching chickens (R. 67). He first heard the train (R. 67); then later according to his testimony he heard the speeder (R. 67). He said that when he first saw the motorcar it was about 100 feet ahead of the train (R. 76, fol. 110). Respondent claims that this would support a finding of a defective light. It does not. The boy was off to one side and not beside the light. The track was on the embankment above him (R. 70). He did not watch the train from the time he first saw it until the accident occurred. He looked away from the track toward the cornstalks to see if there was a chicken there (R. 71). When he looked back again he saw the motorcar on the track (R. 79). He was 40 rods from the speeder, below it, and off to one side, but he had no difficulty then in seeing a man on the speeder (R. 76).

The boy never testified at any time that he *could not see* the speeder until the train came within 100 feet of him, the

Supreme Court of Minnesota to the contrary notwithstanding. What he *did* say was that *he did not see* it until the train was within 100 feet. He saw the train, then looked for his chickens, then looked up and saw the man on the motorcar.

Proof of the fact necessary to sustain the verdict requires evidence of a far more substantial character than this. The boy's evidence does not furnish a foundation upon which anyone could hazard a guess as to whether a person in the engine cab could see a man 800 feet ahead.

Again respondent claims that because the fireman testified that the setting of the brakes, the blowing of the whistle, and the collision, all seemed to come together (R. 44) a like conclusion of a defective light may permissibly be drawn. They would all seem to come together. Such speculation cannot be dignified as proof.

Nor can the baseless argument that because the train stopped in 2210 feet and 2170 feet respectively when the brakes were afterward tested, a defective light was shown. That testimony would eliminate the claim that the brakes were defective, but it has nothing whatever to do with the light. The jury was allowed to find a defective light without a scintilla of proof that it was in any respect below the required standard and in the face of petitioner's uncontradicted proof that it was perfect.

II.

Even if the headlight were defective, it was not the proximate cause of the accident.

A train traveling 60 miles per hour strikes a railroad motorcar traveling ahead of it at night. The engineer does not

see the car until it is too late to avoid striking it. The negligence of the engineer is out of the case by the Court's charge. He is not to be found negligent because he did not see the car. He did everything in his power to avoid the accident after he discovered the peril—that is conceded.

The doctrine of last clear chance does not apply in an action of this kind until it appears that the engineer actually saw the deceased and knew of his peril. It conclusively appears that the engineer did everything in his power to avoid the accident.

The claim of negligence is not that the engineer could have seen the deceased sooner [illegible] different light. The claim is that the deceased might have seen a more powerful light and been warned thereby. But of this there is no proof. It is nothing more than surmise. Even if the candle power of the light had been one or two greater, it does not follow logically that the deceased would have been warned thereby, any more than with a weaker light. He was regardless of his own safety. He went out on the track without ascertaining if a train was coming. It was his duty to do so. He did not hear warning blasts of the whistle which were given in plenty of time so that he could have jumped out of the way. "He never turned or looked".

How then can it be assumed that he would have been warned by a little brighter light. Again such conjecture does not reach the dignity of proof.

The uncontradicted proof is that the train would have struck deceased anyway, even if the engineer discovered deceased at a distance of 800 feet. There is no proof that he did not discover him before within 800 feet. But even if he did not, it makes no difference. Just discovering him at 800 feet the train would have struck the motor anyway.

At the speed the train traveled, it could not stop in less than 2,000 feet (R. 183, 184).

III.

The negligence of the deceased employe was the sole proximate cause of his death, and is, therefore, a complete defense under the Federal Act. The question of proximate cause was for the Court.

Unadilla Ry. vs. Caldine, 278 U. S. 139, 73 L. Ed. 224;
Davis vs. Kennedy, 266 U. S. 147, 69 L. Ed. 212;
Frese vs. C. B. & Q. RR. Co., 263 U. S. 1, 68 L. Ed. 131;
G. N. vs. Wiles, 240 U. S. 444, 60 L. Ed. 732;
McCalmont vs. P. R. R. Co., 273 Fed. 231, 283 Fed. 736;
Certiorari denied, 260 U. S. 751, 67 L. Ed. 495;
Southern Ry. vs. Gray, 241 U. S. 333, 60 L. Ed. 1030;
C. M. & St. P. vs. Coogan, 271 U. S. 472, 70 L. Ed. 1041.

That the deceased was negligent was proven beyond any question. He violated the rules. He carried no lanterns. He did not get information as to trains. He did not watch out for trains. He knew it was his duty to keep out of the way.

In Great Northern Railway Co. v. Wiles, supra, a freight train stopped owing to the pulling out of a drawbar—an alleged violation of the Safety Appliance Act. The deceased, in violation of his orders, failed to put out warning signals and was killed when a passenger train crashed into the freight. His violation of the rules and his instructions was the sole cause of his death—even though there was a jury question as to the violation of the Safety Appliance Act.

The Wiles case was followed in Boghich v. Louisville & N. R. Co., 26 Fed. 2d, 361, in which case the proximate cause of the death of the engineer was held to be his own failure to follow his instructions and rules, notwithstanding the headlight of the engine was defective. The failure to furnish a proper headlight did not cause the accident. The deceased caused it by not obeying his rules.

So in the following case, the negligence of the deceased in failing to obey rules was held to be the sole proximate cause, to-wit:

Southern Ry. Co. v. Youngblood, 286 U. S. 313, 76 L. Ed. 1124, 52 Sup. Ct. Rep. 518.

In the McCalmont case, supra, there was a violation of the Safety Appliance Act, but the deceased (as did Rambo) violated his rules by failing to put out signals for his own protection and such failure was held to have been the proximate cause of his death.

The Railroad Company owed deceased no duty to look out for or warn him of the approach of the train. It was his duty to look out for and keep out of the way of the train.

Connelly vs. Penn. R. Co., 228 Fed. 322;
Aerkfetz vs. Humphreys, 145 U. S. 418, 36 L. ed. 758;
Chesapeake & Ohio vs. Nixon, 271 U. S. 218, 70 L. Ed. 914;

The Nixon case was distinguished in

Rocco vs. Lehigh Valley R. Co., 288 U. S. 275, 77 L. Ed. 743,

where (1) the accident happened on a blind curve; (2) the workmen's view was obscured; (3) the train was required to give warning when approaching the curve but failed to do so; and (4) the presence of Rocco on the track at that point should have been expected by the engineer.

In the case of Bernola vs. Penn. R. Co., 68 Fed. (2) 172, a trackman was killed by an extra unscheduled train traveling 50 miles per hour. No signals or warnings were given. The Court, following the general rule and not the exception alluded to in the Rocco case, held that the Railroad Company owed no duty to the deceased to give him any warning; that failure to give any warning whatever of the approach of the train was not negligence; that the proximate cause of the accident was the failure of Bernola to watch for the approach of trains.

See also:

Atlantic Coast Line v. Driggers, 279 U. S. 787, 73 L. Ed. 457, 49 Sup. Ct. Rep. 490.

The decisions in Minnesota fully sustain the argument that it was the duty of deceased to watch for trains; that failure to do so is the proximate cause; that the Company owes no duty to the trackman to warn him. See:

May vs. C. M. & St. P. R. Co., 147 Minn. 310, 180 N. W. 218;

Greisch vs. M. St. P. & S. S. M. R. Co., 160 Minn. 83, 199 N. W. 517.

Decisions of other State Courts are to the same effect:

Dozier vs. Mo. Pac. R. Co., 176 Ark. 651, 3 S. W. (2nd) 678;

Norfolk & W. R. Co. vs. Smith, 152 Va. 165, 146 S. E. 268;

Cincinnati &c. R. Co. vs. Swann, 160 Ky. 458, 169 S. W. 886, L. R. A. 1915C, 27.

There is no proof that a light ten times more powerful would have overcome the effects of the negligence of the de-

ceased. To so find is to base liability upon a mere guess. The negligence of the deceased was the sole proximate cause and defendant is not liable.

IV.

CONCLUSION.

We respectfully submit that this court should reverse the judgment of the Supreme Court of Minnesota, and prohibit a recovery where there is no evidence warranting it, and where the Railroad Company has violated no duty resting upon it, and where the fatal accident resulted solely from the disobedience of orders by the employee.

Respectfully submitted,

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FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 696

CHICAGO GREAT WESTERN RAILROAD COMPANY,
A CORPORATION,
Petitioner,

vs.

MARY RAMBO, AS ADMINISTRATRIX OF THE ESTATE OF ROY C. RAMBO, DECEASED,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

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Opinion.

The opinion of the Supreme Court of the State of Minnesota in this matter is reported in 263 N. W. 112.

Statement of the Case.

Respondent recovered for the death of her husband by petitioner's wrongful act. Petitioner moved for judgment notwithstanding but not for a new trial. This motion was

denied and judgment was entered. Petitioner appealed to the Supreme Court of the State of Minnesota. The judgment was affirmed on November 1, 1935 and petitioner applied for re-argument to the Supreme Court of the State of Minnesota. Said petition was denied on November 14, 1935, and judgment was entered. Petitioner filed its petition for a writ of certiorari on the 13th day of January, 1936.

Petitioner's summary statement of facts is somewhat deficient and contains some inaccuracies. The opinion of the Supreme Court of the State of Minnesota (R. 342-348) contains a more thorough and more accurate statement of the facts. Consequently, respondent will not set forth a detailed statement of facts herewith.

ARGUMENT.

Summary of Argument.

1. The case does not present any dispute as to the interpretation of any Federal Statutes or as to the principles set forth in any applicable decision of this Court.

2. The evidence of the violation of the Federal Boiler Inspection Act, as it applies to locomotive headlights, was properly submitted to the jury and the Supreme Court of the State of Minnesota properly affirmed the judgment in the court below.

3. The violation of the Federal Act was a proximate cause of decedent's death and the judgment of the trial court was properly affirmed by the Supreme Court of the State of Minnesota.

4. The negligence of the decedent was not the sole proximate cause of his death.

I.

The case does not present any dispute as to the interpretation of any Federal statutes or as to the principles set forth in any applicable decision of this Court.

The Federal Statutes involved are Title 45, Chapter 1, Section 23, of the United States Code Annotated, which provides as follows:

> "It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb. * * *"

Title 45, Chapter 2, Section 53, of the United States Code Annotated, which provides as follows:

> "In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of the chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee; *provided, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.*" (Italics ours.)

and Title 45, Chapter 1, Section 7, which provides as follows:

> "Any employees of any common carrier engaged in interstate commerce by railroad who may be injured by any locomotive, car, or train in use contrary to the provisions of this chapter shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge."

There was no dispute either in the trial court or in the Supreme Court or at any time in these proceedings as to the interpretation or applicability of these respective statutes. The dispute revolves solely and simply about the question of the sufficiency of the evidence.

Petitioner, in its petition (p. 9), states as its reason relied on for allowance of the writ of certiorari that the Supreme Court of the State of Minnesota has refused to follow the decision of this Court in the case of *Chicago, Milwaukee, St. Paul and Pacific Railway Company* v. *Coogan*, 271 U. S. 472, 70 L. Ed. 1041. The principle enunciated by this Court in that decision is contained in the following language:

> "* * * if it is found that as a matter of law the evidence is not sufficient to sustain a finding that the carrier's negligence was a cause of the death, judgment against the carrier will be reversed. * * *"
>
> "It is the duty of the trial judge to direct a verdict for one of the parties when the testimony and all the inferences which the jury reasonably may draw therefrom would be insufficient to support a different finding."

This principle of law was not disregarded by either the trial court or the Supreme Court. On the contrary, the evidence was specifically reviewed and considered and under the decisions of this Court found to be sufficient when con-

sidered with the inferences which the jury reasonably might draw therefrom to support the finding of the jury.

In fact, the Supreme Court of the State of Minnesota, in its opinion, specifically referred to the case of *Baltimore and Ohio R. R. Co.* v. *Groeger*, 266 U. S. 521, 69 L. Ed. 419, in which this Court enunciated the same principle of law in almost identical language as that in the *Coogan* case.

II.

The evidence of the violation of the Federal Boiler Inspection Act, as it applies to locomotive headlights, was properly submitted to the jury and the Supreme Court of the State of Minnesota properly affirmed the judgment in the court below.

There are four distinct portions of the evidence which indicate that the headlight on appellant's train involved in this fatal accident did not comply with the law.

The first is the testimony of the engineer himself. He testified that he was looking ahead; that at a distance of seven, eight, or nine car lengths he noticed what appeared to be two dogs running on the track, and that not until he was five or six car lengths away was he able to distinguish the man and speeder (f. 223). This would be a distance of 250 or 300 feet, as each car is 50 feet in length (ff. 374, 375). Under the engineer's direct testimony, which was clearly given and repeated (f. 241), the headlight did not comply with the legal requirement. Clearly, the speeder upon the track, with the man sitting on a seat as high as a man's hips (ff. 82, 83) presented a larger object, and one more easily seen, than the statutory test of a dark object as large as a man.

The fact that the engineer when recalled to the stand by petitioner after an intervening talk with petitioner's claim agent (f. 754) stated that the distance might have been a

thousand feet (ff. 741-743) does not in any manner detract from the weight of his original testimony.

Petitioner's argument that the engineer was not looking 800 feet ahead is faulty since he actually was looking to the outer range of visibility as indicated by his inability to distinguish the speeder when first observed at approximately 400 feet.

The second important portion of the evidence which indicates that the headlight did not meet the legal requirements, was the testimony of the farm boy, Nicholas Schaack. This young man was standing off to one side of the track in a position where this entire accident unfolded before him on the raised elevation of petitioner's track (ff. 299-301, Exhibit C). He testified that he was unable to distinguish the man and the speeder until the train was within about one hundred feet of the speeder (ff. 301-303, 326-329); that the train whistled when within fifty feet of the speeder; and that the sparks began to fly from the wheels of the train when within one rod of the speeder (ff. 339, 340, 303, 304). His testimony was unshaken and in fact was strengthened on cross examination (ff. 325-333). He indicated the relative positions on the pictures that were in evidence (ff. 301-303, Exhibit C). These marks placed upon the pictures clearly corroborate his oral testimony when it is borne in mind that the telephone poles are about 175 feet apart (f. 669). His testimony as a whole clearly indicates that he was an observant witness testifying in a truthful, straight-forward manner. It should also be noted that he was interviewed on the morning after the accident by a claim agent of petitioner (f. 346).

The third important portion of the evidence bearing upon the violation of the Federal Act was the testimony of the fireman. His testimony that the setting of the brakes, the toot of the whistle, the explosion when the train hit the speeder, and the grinding of the wheels of the train over

the speeder, all seemed to come together (ff. 188-189), when taken with the engineer's testimony that he (the engineer) set his emergency brake immediately upon distinguishing the man and the speeder, clearly indicate that the headlight was defective, and that the engineer did not distinguish the speeder until practically upon it.

If the engineer had seen the speeder when he was the required 800 feet away, with the speeder travelling in the same direction at approximately one-third the speed of the locomotive, the train would have travelled in excess of 1200 feet before it overtook the speeder, even assuming no reduction in the speed of the train; and at least 14 seconds would have elapsed from the first setting of the brakes to the impact with the speeder. Clearly, if this length of time had elapsed during which the emergency brake was set, the train was slowing down and the whistle was blowing, the fireman would have had a distinct recollection of these events prior to the impact with the speeder and the grinding of the speeder under the wheels of the locomotive. Here again, then, the testimony indicates a defective headlight which prevented the engineer from distinguishing the speeder at the legal distance.

The fourth portion of this evidence which indicates strongly that the headlight was defective is the evidence as to the brake tests subsequently made. In two carefully conducted tests with the same equipment and the same engineer applying the brakes in the same manner as at the time of the accident, the train was brought to a stop in distances of 2,210 and 2,170 feet respectively (ff. 772-775, 778-780, 800-803). On the first test the speed was estimated as being 60 miles an hour (f. 778) and in the second test the speed was "clocked," and found to be 61 miles an hour (f. 780). This was the maximum speed permitted on this track (f. 814). The point at which the engineer was flagged

for these tests would correspond to the point at which he distinguished the man on the speeder. It is to be noted, however, that on the night of the accident the train travelled 2,327 feet from the point of actual impact with the speeder (ff. 366-368, 655). This clearly shows that the engineer did not distinguish the speeder until practically the moment he hit it. Conducted as carefully as they were with experts in attendance, these tests constitute very strong evidence that the headlight was defective and that the engineer did not get his "flag," that is, did not distinguish the speeder, until practically upon it.

It is respectfully submitted that any one of these four independent portions of evidence would be sufficient to make it a question of fact for the jury as to whether or not the headlight complied with the law. Taken all together, each corroborating the other, they almost conclusively prove that the headlight was so defective and so dim that the engineer was unable to see the speeder until just about as he hit it and that the boy in the field accurately saw the distances and succeeding rapid fire events.

In contradiction of this conclusion, petitioner urges the testimony of the chief electrician who testified that he happened to be riding on this particular train and checked the light immediately after the accident. At best, this would merely constitute contradictory evidence. When taken in light of the fact that this chief electrician claimed that the headlight as the train stood upon the track after the accident shone straight down the middle of the track for 1,000 feet (f. 569), when in fact the engine had stopped at the point of a curve and the headlight would obviously be pointing out to the side of the track (ff. 638-640), and in light of the further fact that this chief electrician testified that he had examined the headlight after the first accident, and that it was not then burning (f. 559), whereas both the fireman and engineer testified that it was burning (ff. 237, 150,

155), clearly this witness's testimony may be disregarded in its entirety.

It is respectfully submitted that this evidence was properly submitted to the jury by the trial court and that as stated by the Supreme Court of the State of Minnesota, these facts justified the jury in finding that the headlight did not comply with the standard fixed under the Boiler Inspection Act.

III.

The violation of the Federal act was a proximate cause of decedent's death and the judgment of the trial court was properly affirmed by the Supreme Court of the State of Minnesota.

As stated by the Supreme Court of the State of Minnesota, in their opinion:

> "We do not doubt that if the headlight violated that act, the evidence warranted the jury in concluding that such violation or negligence caused or contributed to cause Rambo's death."

Travelling as he was in the same direction as the train, with the noise of his motor making it impossible to hear the train, the headlight of the locomotive would have been an invaluable warning to Rambo of the approach of the train. It is clear that he could have quickly and easily swung off the speeder to the right of the rails clear of the tracks had he been aware of the train's approach. Likewise with the two objects travelling in the same direction the engineer would have had a valuable opportunity to slow down his train as it overtook Rambo. This would have been an important contribution to the avoidance of the fatal accident.

All the evidence indicates that the train with its defective headlight suddenly overtook Rambo in the darkness, de-

priving the engineer of the opportunity to avoid the fatal collision, and depriving Rambo of the warning to which he was entitled.

IV.

The negligence of the decedent was not the sole proximate cause of his death.

It is clear that the sole proximate cause rule does not apply to the instant case. Rambo did not in any manner cause or contribute to the defective headlight. Any negligence that he might have been guilty of in the operation of the speeder was very properly found to be only contributing and hence not a bar to respondent's recovery. The negligence of petitioner as to its headlight was independent of any negligence on the part of decedent.

Conclusion.

It is, therefore, respectfully submitted that the case at bar is not one calling for the exercise by this court of its supervisory powers, and that the Supreme Court of the State of Minnesota has not decided a Federal question of substance in a way not in accord with applicable decisions of this Court. To such end, it is respectfully submitted that the petition for a writ of certiorari to the Supreme Court of the State of Minnesota be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term 1935

No. 696

CHICAGO GREAT WESTERN RAILROAD COMPANY, a corporation,

Petitioner,

vs.

MARY RAMBO, as administratrix of the Estate of Roy C. Rambo, deceased,

Respondent.

BRIEF FOR RESPONDENT

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IN THE

Supreme Court of the United States

October Term 1935

No. 696

CHICAGO GREAT WESTERN RAILROAD COMPANY, a corporation,

Petitioner,

vs.

MARY RAMBO, as administratrix of the Estate of Roy C. Rambo, deceased,

Respondent.

BRIEF FOR RESPONDENT

Opinion of the Court Below.

The opinion of the Supreme Court of the State of Minnesota in this matter is reported in 263 N. W. 112.

Statement of the Case.

This was an action instituted by Respondent as administratrix against Petitioner to recover damages for the wrongful death of her husband, Roy C. Rambo, (R. 1-5) who Petitioner admits was killed at 5:10 P. M. on De-

cember 8, 1933 by being run down by Train No. 8 while riding on Petitioner's tracks on a motor car and while engaged in interstate commerce (R. 14-15). Respondent alleged in her complaint that Petitioner's train was illegally operated with an insufficient, dangerous and defective headlight; that it was operated without a pilot or cow-catcher, and at an excessive rate of speed, and that Petitioner's station agent was negligent in not warning decedent or the train crew (R. 3-5).

The case was tried in the District Court of Dakota County, Minnesota, on May 23, 1934, (R. 7) and was submitted to a jury on the question of the violation of the Federal Boiler Inspection Act as to locomotive headlights (R. 210-212); particularly Rule 129 of the Interstate Commerce Commission, which requires:

> "A headlight which shall afford sufficient illumination to enable a person in the cab of such locomotive, who possesses the usual visual capacity required of locomotive enginemen, to see in a clear atmosphere, a dark object as large as a man of average size standing erect at a distance of at least 800 feet ahead and in front of such headlight . . ." (R. 219-220).

The jury returned a verdict for Respondent in the sum of $15,000.000 (R. 217). The trial court denied Petitioner's motion for judgment notwithstanding on March 4, 1935 (R. 238). Judgment was entered for Respondent and Petitioner appealed to the Supreme Court of the State of Minnesota. The appellate court affirmed the judgment on November 1, 1935, and Petitioner applied for a re-argument. Said petition was denied on November 14, 1935 and judgment was entered. Petitioner filed its petition for a Writ of Certiorari and the Writ was granted on February 17, 1936.

Decedent, Roy C. Rambo, was forty-seven years of age and was a signal maintainer in the employ of Petitioner at the time of his death (R. 8-9). He had been in Petitioner's employ for eighteen years (R. 8), and had been a signal maintainer for fifteen years (R. 8-9). His duties were to inspect and maintain Petitioner's signal lights, crossing bells, telephone and telegraph lines (R. 123-124, 159), along the territory from Empire to the West Switch at Dennison (R. 145), a distance of about thirteen miles. Randolph, where Rambo lived, and Hampton were both stations along this territory.

Petitioner supplied decedent with a motor car which he operated on the railroad tracks in the course of his duties and in returning home from work (R. 124, 159). Petitioner sent out over its telephone wires two regular lineups each day, one at 7:50 A. M. and the other at 12:50 P. M., both of which decedent secured on the day of his death in accordance with Petitioner's rules (R. 99-100, 17). Petitioner also sent to decedent numerous other rules, letters, instructions, and circulars (R. 120-122), some of which were extracted from his files and placed in evidence (R. 151-152).

On December 8, 1933, decedent went to work as usual and travelled North on Petitioner's tracks along his territory. He stopped at Hampton, repaired a crossing bell (R. 95), and travelled on North to Empire. In the afternoon he returned to Hampton. At 4:55 P. M. Petitioner's station agent at Hampton saw decedent stop in front of his station with his motor car and tinker with the motor (R. 91). The agent did not warn decedent of an oncoming train (R. 92-93). Decedent proceeded South on the tracks toward Randolph (R. 92). The station agent did not advise the train crew or the dispatcher of decedent's presence on the tracks

(R. 92-93). There is no evidence of decedent's knowledge or lack of knowledge that Train No. 8 had not passed Hampton and was coming soon.

Petitioner's Train No. 8 on that day left St. Paul at 3:37 P. M.—seven or eight minutes late (R. 29). At Rich Valley this train had an accident in which two men in a truck were killed at a crossing (R. 47). The train was delayed about 45 minutes (R. 48). The pilot or cow catcher, which was broken in this accident (R. 30), was removed, and the train proceeded South without a pilot (R. 61). The train went through Hampton going South at 5:05 P. M. (R. 94). It was due at Hampton at 4:12 P. M. and hence was fifty-three minutes late (R. 94).

It was a dark, cloudy evening. The ground was bare. The sun set at 4:30 o'clock (R. 235, 107). About two miles South of Hampton, Train No. 8 was travelling at 60 miles per hour (R. 52, 64). By his own testimony the engineer was looking ahead and first saw what appeared to be a couple of dogs about 350 to 450 feet ahead (R. 51-52). He was not able to distinguish the speeder and man until within five or six car lengths or 250 to 300 feet (R. 52, 87-88). A boy in a nearby field could not distinguish the man and the speeder until the train was within 100 feet of the speeder (R. 70, 76-78). Upon distinguishing the man and the speeder, the engineer immediately made an emergency application of brakes, blew his whistle, sanded his wheels, (R. 52, 56-57). The fireman, who was not looking out of his window, testified that the first thing he noticed was the noise of the train wheels grinding over the speeder (R. 39-40). He also testified that this noise, a flash of light, the whistle, and the emergency application of brakes all appeared to come together (R. 44). The boy estimated that

the train was 50 feet from the speeder when the whistle blew and a rod away when the sparks flew from the wheels (R. 79, 70-71).

The train travelled 2,327 feet from *the point where it first hit the speeder* to the point where it came to a stop (R. 86, 154). In two subsequent tests the same train, with the same equipment throughout and the same engineer, travelling at an estimated speed of 60 miles per hour and at a clocked speed of 61 miles per hour, stopped in 2210 feet and 2170 feet respectively from *the point at which the engineer was flagged* (R. 182-184, 188-189), the engineer applying the brakes in the same manner as at the time of the accident (R. 60).

Decedent was sitting upright on the seat of his speeder looking forward and did not look back (R. 53). This seat was about as high as a man's hips (R. 19). The speeder motor made a considerable amount of noise (R. 93-94, 101-102), sufficient to drown out the noise of an overtaking train (R. 103). The operator of a speeder such as decedent was riding can easily throw his legs to the right and drop off to the side of the track while the speeder is in motion (R. 102-103, 19). Decedent was a spry, active and healthy man (R. 90-91).

No question was raised as to the amount of the verdict.

ARGUMENT.

Summary of Argument.

Petitioner contends in its Brief: (1) that there was no evidence to sustain the finding of a violation of the Federal Boiler Inspection Act; (2) that even if it be granted that there was sufficient evidence to sustain a finding of such violation, the violation was not the proximate cause of the accident; (3) that the negligence of decedent was the sole proximate cause of his death and therefore constituted a complete defense; and (4) that the case at bar falls within the so-called "No Duty to Warn" rule as laid down by several Federal and United States Supreme Court decisions.

It is Respondent's contention:

A. That Petitioner violated the Federal Boiler Inspection Act as it applies to locomotive headlights, and that the evidence of this violation was properly submitted to the jury.

B. That the violation of the Federal act was a proximate cause of decedent's death, and that this issue was properly submitted to the jury.

C. That the negligence of decedent was not the sole proximate cause of his death and does not constitute a defense under the Federal Boiler Inspection Act.

D. That decedent was entitled to the warning which a proper headlight would have afforded him, and that the so-called "No Duty to Warn" rule urged by Petitioner is not applicable to the case at bar.

E. That the case was properly tried and submitted to a jury and that judgment of the Minnesota Supreme Court herein should be affirmed.

A.

Petitioner violated the Federal Boiler Inspection Act as it applies to locomotive headlights, and the evidence of this violation was properly submitted to the jury.

Title 45, Chapter 1, Section 23 of the United States Code Annotated provides as follows:

> "It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb . . ."

To comply with this law the Interstate Commerce Commission, Bureau of Locomotive Inspection, has passed a rule, known as Rule No. 129, which requires each locomotive used in road service between sunset and sunrise to have a headlight which shall afford sufficient illumination to enable a person in the cab of such locomotive who possesses the usual visual capacity required of locomotive enginemen, to see in a clear atmosphere a dark object as large as a man of average size standing erect at a distance of at least 800 feet ahead and in front of such headlight (R. 220).

There is ample evidence that the headlight on Petitioner's train at the time of the fatal collision was defective and did not comply with the requirements of the Federal Boiler Inspection Act. There are, Respondent submits, five distinct portions of the evidence which prove this violation.

The first is the testimony of Petitioner's engineer. He testified that he was looking ahead (R. 53); that at a distance of seven, eight or nine car lengths he noticed what ap-

peared to be two dogs running on the track (R. 51-52), and that not until he was five or six car lengths away was he able to distinguish the man and speeder (R. 52). This would be a distance of 250 to 300 feet, as each car is 50 feet in length (R. 87). Under the engineer's direct testimony, which was clearly given and repeated (R. 56), the headlight did not comply with the legal requirement. Clearly, the speeder upon the track with the man sitting on a seat as high as a man's hips (R. 19) presented a larger object, and one more easily seen, than the statutory test of a dark object as large as a man.

Petitioner in its Brief alleges that there was nothing in the engineer's testimony to indicate that the headlight did not comply with the legal requirement because the engineer did not say how far ahead he was looking (Petitioner's Brief, pp. 9, 10 and 11).

The engineer himself testified that he was looking "straight ahead" at all times while the train was covering the three-quarters of a mile or mile of track up to the place of the accident (R. 53, 174), and that he saw something down on the track which when he first noticed it at about 350 to 450 feet he thought was a dog or two running down the track (R. 51-52). He testified that he did not distinguish the object as being a speeder with a man on it until he was some 100 or 150 feet closer (R. 52).

It is a well-known and hardly to be controverted fact that the driver of an automobile or other vehicle almost automatically keeps his eyes fixed on a point at the very outer edge of the beam thrown by his lights. This fact, when taken into consideration with the engineer's positive testimony that he was looking straight ahead at all times and that when he first saw the object he thought it was a dog or

two running down the track, clearly establishes that he was looking to the outer range of visibility—as far ahead as the light from the headlight permitted him to look.

The fact that the engineer when recalled to the stand by Petitioner after an intervening talk with Petitioner's claim agent (R. 178) stated that the distance might have been a thousand feet (R. 175) does not in any manner detract from the weight of his original testimony, particularly when it is noted that the engineer's testimony at the inquest also indicated the defective headlight (R. 207).

Petitioner also argues that the rule requiring a headlight which will reveal a man standing erect at a distance of 800 feet, assumes that both engine and man should be standing still, and that there was no proof that the moving speeder with a man sitting on it was as visible as a man standing erect on the track. (Petitioner's Brief, p. 11). This assumption is obviously erroneous and constitutes a false premise. There would be no necessity for a safety rule of any kind if trains were to remain stationary.

The second important portion of the evidence that the headlight did not meet the legal requirements, was the testimony of the farm boy, Nicholas Schaack. This young man was standing off to one side of the track in a position where this entire accident unfolded before him on the raised elevation of Petitioner's track (R. 70, Exhibit C). He testified that he first distinguished the man and the speeder when the train was within about one hundred feet of the speeder (R. 70, 76-77); that the train whistled when within fifty feet of the speeder; and that the sparks began to fly from the wheels of the train when within one rod of the speeder (R. 79-80, 70-71). His testimony was unshaken and in fact was strengthened on cross-examination (R. 76-78). He in-

dicated the relative positions on the pictures that were in evidence (R. 70, Exhibit C). These marks placed upon the pictures clearly corroborate his oral testimony when it is borne in mind that the telephone poles are about 175 feet apart (R. 157). His testimony as a whole clearly indicates that he was an observant witness testifying in a truthful, straight-forward manner. It should also be noted that he was interviewed on the morning after the accident by a claim agent of Petitioner (R. 80-81).

Petitioner contends that because the boy was off to one side of the track and because the track was on an embankment above him, his testimony that when he first saw the speeder it was about one hundred feet or so ahead of the engine does not support the finding of a defective headlight (Petitioner's Brief, p. 12). Clearly, the fact that the boy was looking at the track from an angle cannot detract from his testimony that he first saw the speeder when it was "about one hundred feet or so" ahead of the engine. In fact, the boy's being beside the track instead of in the cab of the engine afforded him a better opportunity than the engineer had to actually ascertain the distance which the light from the headlight shone down the track.

Petitioner also asserts that because the boy looked away from the track after he first saw and heard the train, his testimony that he saw the speeder in the light of the headlight when he again looked at the track, at which time the speeder was approximately only one hundred feet ahead of the train, does not constitute proof that the speeder was not discernible in the light of the headlight at a much greater distance (Petitioner's Brief, pp. 12 and 13). The boy testified that when he first looked up and saw the train he was about thirty rods or so away from it (R. 76); that he then

looked toward some cornstalks to see if there was a chicken there (R. 71) and again looked toward the track when he heard the speeder (R. 79); that he was about forty rods from the speeder when he first saw it and that it did not show up very plainly in the light of the headlight (R. 74-77). Clearly, the boy's testimony that at a distance of forty rods from the speeder he could not see it very plainly in the light of the headlight when the engine was only approximately one hundred feet behind the speeder, of itself constitutes ample evidence that the headlight was defective.

The third important portion of the evidence of the violation of the Federal Act was the testimony of the fireman. His testimony that the setting of the brakes, the toot of the whistle, the explosion when the train hit the speeder, and the grinding of the wheels of the train over the speeder, all seemed to come together (R. 44), when taken with the engineer's testimony that he (the engineer) set his emergency brake immediately upon distinguishing the man and the speeder, clearly indicates that the headlight was defective, and that the engineer did not distinguish the speeder until practically upon it.

If the engineer had seen the speeder when he was the required 800 feet away, with the speeder traveling in the same direction at approximately one-third the speed of the locomotive, the train would have travelled in excess of 1200 feet before it overtook the speeder, even assuming no reduction in the speed of the train; and at least fourteen seconds would have elapsed from the first setting of the brakes to the impact with the speeder. Clearly, if this length of time had elapsed during which the emergency brake was set, the train was slowing down and the whistle was blowing, the fireman would have had a distinct recollection of these

events prior to the impact with the speeder and the grinding of the speeder under the wheels of the locomotive. Here again, then, the testimony shows a defective headlight which prevented the engineer from distinguishing the speeder at the legal distance.

The fourth portion of the evidence that the headlight was defective is the evidence as to the brake tests subsequently made. In two carefully conducted tests with the same equipment and the same engineer applying the brakes in the same manner as at the time of the accident, the train was brought to a stop in distances of 2210 feet and 2170 feet respectively (R. 182-184, 188-189). The speed on both tests was estimated as being sixty miles an hour (R. 182-184). This was the maximum speed permitted on this track (R. 192). The point at which the engineer was flagged for these tests would correspond to the point at which he distinguished the man on the speeder. It is to be noted, however, that on the night of the accident the train traveled 2327 feet from the point of actual impact with the speeder (R. 86, 154). This clearly shows that the engineer did not distinguish the speeder until practically the moment he hit it. Conducted as carefully as they were with experts in attendance, these tests constitute very strong evidence that the headlight was defective and that the engineer did not get his "flag", that is, did not distinguish the speeder, until practically upon it.

A fifth portion of the evidence which corroborates the conclusion that the headlight was defective at the time of the collision is the fact that the decedent, an alert, active employee with a record for safety and many years of service in an exacting position for the Petitioner (R. 152-153), did not discover the approach of the train to his rear. This fact is

ground for a strong inference corroborating the other evidence that the headlight was so defective that it did not constitute any warning of the approach of the train. A locomotive headlight of legal strength, sufficient to distinguish a man 800 feet ahead, would also obviously be of sufficient strength to furnish a clear and early warning to the decedent of the approach of the train. The fact that the warning was not furnished again indicates that the light was defective.

It is respectfully submitted that any one of these five independent portions of evidence would be sufficient to make it a question of fact for the jury as to whether or not the headlight complied with the law. Taken all together, each corroborating the other, they almost conclusively prove that the headlight was so defective and so dim that the engineer was unable to see the speeder until just about as he hit it and that the boy in the field accurately saw the distances and succeeding rapid fire events.

In contradiction of this conclusion, Petitioner did not present any direct evidence that the headlight of the locomotive in question did comply with the Federal Boiler Inspection Act at the time of the accident. The only evidence produced by Petitioner was evidence from which it asks that an inference be drawn that the lights were properly maintained at the time of the collision, notwithstanding the direct positive testimony of its own engineer. The testimony of the electrician who testified that he checked these lights when the train left the roundhouse (R. 136-137), was at best merely contradictory evidence and when taken in light of the fact that a severe head-on collision had occurred prior to the accident in which decedent was killed, this testimony can have little weight.

Likewise, the testimony of the chief electrician who claimed that he happened to be riding on this particular train and checked the light immediately after the accident can at best only inferentially contradict the direct evidence of the defective light at the time of the fatal collision. When this testimony is viewed in light of the further fact that this chief electrician claimed that the headlight as the train stood upon the track after the accident shown straight down the middle of the track for 1000 feet (R. 133-134) when, in fact, the engine had stopped at the point of a curve and the headlight was obviously pointing out on the side of the track (R. 150), and in the light of the further fact that this chief electrician testified that he had examined the headlight after the first accident and that it was not then burning (R. 131) whereas both the fireman and engineer testified that it was burning after this first accident, (R. 55, 35-36), then clearly this witness' testimony may be disregarded in its entirety.

It is respectfully submitted that the question of the defectiveness of the headlight and the violation by Petitioner of the Federal Boiler Inspection Act, was properly submitted to the jury by the trial court, with full, fair and complete instructions, and that as stated by the Supreme Court of the State of Minnesota, the evidence upon this point justified the jury in finding that the headlight did not comply with the standard fixed under the Boiler Inspection Act (R. 241-246).

B.

The violation of the Federal Act was a proximate cause of decedent's death, and this issue was properly submitted to the jury.

Evidence of a causal connection between the negligence of an employer or its use of a defective appliance and the injury or death of an employee may be circumstantial. A case is made if the facts in evidence are such as to permit a fair inference that the negligence or defective appliance contributed to the injury or death.

Myers v. Pittsburgh Coal Co., (1914), 233 U. S. 184, 34 S. Ct. 559, 58 L. Ed. 906.

Gray v. Davis, (C. C. A. N. H. 1923), 294 Fed. 57.

Chesapeake & O. Ry. Co. v. Smith, (C. C. A. Ohio 1930), 42 F. (2d) 111, Cert. denied 282 U. S. 856, 51 S. Ct. 32, 75 L. Ed. 758.

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MacIntosh v. Great Northern Ry. Co., (1922), 151 Minn. 527, 188 N. W. 551.

Lewis v. Chicago Great Western R. Co., (1923), 155 Minn. 381, 193 N. W. 695.

Anderson v. Minneapolis, St. P. & S. S. M. Ry. Co., (1923), 156 Minn. 338, 194 N. W. 762.

See *Northern Ry. Co. v. Page*, (1927), 274 U. S. 65, 47 S. Ct. 491, 71 L. Ed. 929.

See also *Swanson v. Chicago, M. & St. P. Ry. Co.*, (1924), 158 Minn. 171, 197 N. W. 275.

Nealis v. Chicago, R. I. & P. Ry. Co., (1928), 173 Minn. 587, 218 N. W. 125.

In the *Myers v. Pittsburgh Coal Co.* case, the facts disclose that decedent, a brakeman in a mine, was riding the rear car of a train of thirty or forty empty coal cars, which train was being pulled by a large electric motor car, the headlight of which had not been burning for some days. A flying switch was made, the electric motor car continuing down the main entry while the train of empty cars went down a side entry. The electric motor car then backed up and followed the train of cars into the side entry in order to distribute the cars after overtaking them. Some distance down the side entry there was a branch of a trolley system which ran into still another entry. At this point the trolley wire of the branch system passed over the tracks in the side entry at a distance of about five feet seven and one-half inches above the rails, making it necessary for a man of ordinary height riding on a car down the side entry to stoop down in order to pass under the wire. Just before decedent came to this spot he was seen signaling for the electric motor car to catch up with the train of cars. The electric motor car, proceeding down the side entry after the train of cars, ran upon an object and stopped. The object was decedent, lying in the middle of the track with his head toward the electric motor car and his cap, with the light on it still burning, lying upright beside the track. In an action for wrongful death, there was a verdict for plaintiff in the lower court. On writ of error the case was reversed by the Circuit Court of Appeals. On Writ of Certiorari the United States Supreme Court reversed the judgment of the Circuit Court of Appeals, affirmed the judgment of the Circuit

Court and remanded the case to the District Court. The Court said;

"Under the case made, the jury might well have found that the overhead wire was hung too low for the safety of the men; that there was want of adequate light at this place, and that it was negligence to run the motor car into such a place without the light which it was its duty to provide. * * *

The opinion of the Circuit Court of Appeals placed the reversal largely upon the want of definite proof as to the manner in which Myers came to his death, whether by contact with the wire, or, if so, whether that merely disabled him or he was only injured or stunned by the fall, was seized with vertigo or other sudden sickness and fell from the car for that reason, or lost his footing by some unexpected movement of the train or voluntarily got off the car and stumbled and fell upon the track, or became bewildered in the dark and mistakenly supposed himself to be in a place of safety. The court held that all these situations were more or less probable, and, in the absence of some more accurate means of ascertaining the true condition in this regard, no recovery could be had for the wrongful causing of his death, and that an examination of the testimony brought the court to the conclusion that the jury should not have been permitted to guess as to the proximate cause of death. This question, however, was submitted to the jury and found against the defendant in the trial court. *Unless the testimony was such that no recovery can be had upon the facts shown in any view which can be properly taken of them the verdict and judgment of the District Court must be affirmed.*

That there was ample testimony to carry the question of negligence to the jury we have already said, and in any case it cannot be said as a matter of law that there was no evidence tending to show that Myers came to his death by the negligence of defendant in one or more of

the ways charged in the petition. Considering the testimony, as it must be considered in determining questions of this character in appellate courts, in its most favorable aspect to the plaintiff below, we think the jury might well have found, in view of the place at which the body of Myers was found near to the wire, with his cap gone from his head, that he came in contact with that wire and was thrown to the ground, and that he survived from contact with the wire, carrying the voltage which it did, and while in this situation was run over and killed by the approaching motor car.

We think reasonable men considering the testimony adduced might well have come to this conclusion, and that it was error in the appellate court to set aside the verdict for entire absence of testimony upon this subject. In our opinion, the trial court properly left the question to the jury upon testimony which when fairly considered might sustain the verdict. See Humes v. United States, 170 U. S. 210." (Italics ours.)

In the *Chesapeake & O. Ry. Co. v. Smith* case, plaintiff, the rear brakeman on a railway train of ninety-eight empty coal cars, was riding in the caboose during a switching operation. The train came to a sudden and violent stop as a result of the application of the air brakes. Plaintiff was badly hurt and brought suit to recover for his injuries. In affirming judgment for plaintiff, the Court said:

"It is clear from the evidence of plaintiff's two witnesses that the sudden application of the air brakes was caused either by their being set by the engineer or by the breaking of the train line at the twentieth car from the caboose. * * *

If the breaking of the air line preceded the sudden setting of the brakes and caused it, then it was clearly proper for the jury, in the absence of other evidence, to infer from this alone that the injury resulted from the

company's failure to comply with the absolute duty imposed upon it by the Safety Appliance Acts. * * * And, even though plaintiff, at the time of the accident, was not engaged in an operation in which the Safety appliances are specially designed to furnish protection, the failure to comply with the acts may nevertheless be the proximate cause of the injury. Louisville & Nashville R. R. v. Layton, 243 U. S. 617, 37 S. Ct. 456, 61 L. Ed. 931; Davis v. Wolfe, 263 U. S. 239, 44 S. Ct. 64, 68 L. Ed. 284. This issue was submitted to the jury under a proper charge."

In the *Line v. Erie R. Co.* case the facts disclose that the decedent was a conductor of a freight train consisting of seventy-two or seventy-three box cars and a caboose. The air went on, stopping the train. The decedent and the head brakeman took lanterns and began an inspection, the head brakeman walking ahead. The head brakeman finding the trouble, decedent sent him up to the engine and turned as if to return to the caboose. He was not again seen a[illegible]e. The train started after several minutes. Decedent's body was found lying between the rails, with his chest crushed as if he had been rolled, and one foot cut off and the other crushed. It was found that the brake-rigging was down on one car about half way down the line. Decedent's body was found at about this point. There was some evidence that a wrench and an air hose and decedent's cap were all found nearby; also, that decedent's lattern, unlit, was found between the rails at about this point. Action was brought under the Federal Employers Liability Act and there was a directed verdict for the railroad. In reversing, the Court said:

"We think that this evidence, though circumstantial, is sufficient, if believed by the jury, to sustain a verdict

in appellant's favor. Western & Atl. R. R. Co. v. Hughes, Admx. 278 U. S. 496, 498, 49 S. Ct. 231, 73 L. Ed. 473. The evidence was more than a scintilla. Hardy-Burlingham Min. Co. v. Baker, 10 F. (2d) 277 (C. C. A. 6); Begert v. Payne, 274 F. 784, 788 (C. C. A. 6). It carried a justifiable rather than a mere possible inference (American Oil Co. v. Frederick, 47 F. (2d) 54, 57, C. C. A. 6) that when the engineer started the train the deceased was under it, and could not therefore have given the signal to proceed. * * *

Appellee introduced evidence tending to show that deceased gave the usual starting signal by lantern from the top of the train somewhere near the thirty-fifth or fortieth car from the engine, and contends that after the train started deceased fell between two of the cars to the track below.

It will be noted that this is not a serious contradiction of appellant's evidence as to the whereabouts of deceased relative to car 36 at the time he was struck, but it does contradict the inference that he was under the car when the train started. As such it is of no consequence in determining the correctness of a directed verdict. * * *

That deceased fell is only an assumption on the part of the appellee and is much weakened by the physical facts. Deceased weighed about two hundred pounds, and if in a fall his body had cleared the coupler the inference is that it would have fallen across a rail rather than between the rails and would have been mangled. We do not think that the evidence indicating that deceased gave the starting signal and fell after the train started does, as a matter of law, destroy the effect of appellant's evidence touching the defective brake rigging on car 36, the upright position of the lantern and its undamaged condition, the location and physical condition of the body and the relative location of the deceased's cap, the wrench and the air hose."

The ordinary speed of a speeder such as decedent was using at the time of the accident is twenty miles an hour (R. 101). Since decedent was traveling down grade toward home (R. 114-116) when he was hit, it is reasonable to conclude that he was traveling at about that speed. By elaborate tests which Petitioner made after the accident, the train, traveling at sixty miles an hour, was capable of being stopped in approximately 2100 to 2200 feet (R. 198). A train traveling at the rate of sixty miles an hour must travel approximately 1200 feet from a point 800 feet behind the speeder to overtake it (R. 204-205). It would take the train fourteen seconds to cover this distance. This assumes a continuous speed of sixty miles an hour on the part of the train. If the brakes were applied at the 800 foot point and the speed began to decrease, both the distance which the train would have to travel to reach the moving speeder, and the number of seconds it would take to do so, would increase.

The record is clear that the operator of a speeder such as decedent was riding on can jump off in a very few seconds if he is given any warning (R. 19, 102-103). That a proper headlight—one which will illuminate a man standing erect at a distance of 800 feet—will give a valuable warning to a man on the track of the approach of a locomotive from behind, cannot be questioned. It is common knowledge that the light from such a headlight will not only shine on the rails ahead of the man but also will illuminate the telegraph poles and wires along the right of way ahead of him. No matter in which direction he is looking he cannot fail to see the light and be warned thereby.

It is also significant to note that even though the operator remained on the speeder it would not be necessary, in order to avoid a fatal accident, for the train to be brought to a

stop before it reached the speeder, but merely that the speed of the train be slowed down to the speed of the speeder. In other words, if the engineer had been given the opportunity which the law required to set his brakes at a point 800 feet behind the speeder, the immediate decrease in the speed of the train would have increased the distance over which the train must have traveled before overtaking the speeder. If the distance increased in inverse ratio, the speed of the train would have continued to decrease so that with the speeder continuing at its same speed, the train might well have been brought to a speed of 20 miles per hour before it overtook the speeder and the collision entirely avoided. This is particularly reasonable when it is noted that at a speed of 61 miles per hour, slightly in excess of the maximum speed permitted on this track, the train was brought to a complete stop in only 2170 feet (R. 188-189).

In view of the above authorities and in the light of the above considerations, Respondent submits that the evidence in the case at bar is such as to permit a fair inference that if there had been a sufficient headlight on the engine to have permitted the engineer to see decedent at the required 800 foot distance, and the engineer had immediately applied his brakes, decedent would have had both sufficient warning and time to have jumped off the speeder and escaped injury, and in fact the speed of the train might well have been reduced to the speed of the speeder and the collision would not have occurred.

Petitioner's argument that warning blasts of the whistle were given in plenty of time so that decedent could have jumped out of the way (Petitioner's Brief, p. 14) is absurd. The testimony of the fireman was that the whistle, the application of the brakes, and the explosion caused by the col-

lision all seemed to come together (R. 43-44). The boy who saw the accident from the field testified that the engine was only 50 feet from the speeder when the whistle was blown (R. 79-80). Obviously this would not give a man time to jump. It would hardly give him time to turn his head.

Respondent respectfully submits that under the evidence in this case the causal connection between the violation by the Petitioner of the Boiler Inspection Act with reference to headlights, and the death of the decedent, was a matter of fair inference and constituted a question of fact for the jury. Both decedent and the engineer were deprived by this defective headlight of a number of precious seconds during which the one could have leaped to safety and the other could have greatly reduced the speed of his train and taken other steps to avoid the fatal accident. Respondent urges that the evidence in this case leads to the fair conclusion that if Petitioner had not violated the law decedent would not have been killed.

C.

The negligence of decedent was not the sole proximate cause of decedent's death, and this issue was properly submitted to the jury.

Contributory negligence of decedent is no defense under the Federal Act.

Title 45, Chapter 2, Section 53—Contributory Negligence:

> "In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of the chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee

> may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee; *provided, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.*" (Italics ours.)

Neither is assumption of risk a defense.

Title 45, Chapter 1, Section 7—Assumption of risk by employees:

> "Any employee of any common carrier engaged in interstate commerce by railroad who may be injured by any locomotive, car, or train in use contrary to the provisions of this chapter shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car or train had been brought to his knowledge."

Petitioner contends, however, that the negligence of decedent was the sole proximate cause of his death, and that Petitioner is therefore not liable under the Federal Boiler Inspection Act (Petitioner's Brief, pp. 15 and 16). In support of this contention Petitioner cites the following United States Supreme Court and Federal Court cases:

Unadilla Railway Co. v. Caldine (1928), 278 U. S. 139, 49 S. Ct. 91, 73 L. Ed. 224.

Davis v. Kennedy (1924), 266 U. S. 147, 45 S. Ct. 33, 69 L. Ed. 212.

Frese v. Chicago, Burlington and Quincy R. R. Co. (1923), 263 U. S. 1, 44 S. Ct. 1, 68 L. Ed. 131.

Great Northern Ry. Co. v. Wiles (1916), 240 U. S. 444, 36 S. Ct. 406, 60 L. Ed. 732.

McCalmont v. Pennsylvania Co. (D. C. Ohio 1921), 273 Fed. 231, 283 Fed. 736, Cert. denied 260 U. S. 751, 43 S. Ct. 250, 67 L. Ed. 495.

Southern Ry. Co. v. Gray (1916), 241 U. S. 333, 36 S. Ct. 558, 60 L. Ed. 1030.

Chicago, Milwaukee & St. Paul Ry. Co. v. Coogan (1926), 271 U. S. 472, 46 S. Ct. 564, 70 L. Ed. 1041.

Boghich v. Louisville & N. R. Co. (C. C. A. Fla. 1928), 26 F. (2d) 361.

Southern Ry. Co. v. Youngblood (1932), 286 U. S. 313, 52 S. Ct. 518, 76 L. Ed. 1124.

It is Respondent's contention that some of these cases are distinguishable on their facts from the case at bar, and that the rule of sole proximate cause established in the rest of the cases is so limited as to have no application to the case at bar. A brief analysis of the cases will make this clear.

In the *Southern Ry. Co. v. Gray* and *Chicago, Milwaukee & St. Paul Ry. Co. v. Coogan* cases, recovery was denied on the ground that no negligence was shown on the part of the railroad company. Another case to the same effect not cited by Petitioner in its Brief is the case of *Atlantic Coast Line v. Davis* (1929), 279 U. S. 34, 49 S. Ct. 210, 73 L. Ed. 601.

The *Unadilla Railway Co. v. Caldine, Davis v. Kennedy, Southern Ry. Co. v. Youngblood* and *Boghich v. Louisville & N. R. Co.* cases, all involved violation by decedent of specific train orders regarding the meeting or passing of other trains. Other cases to the same effect not cited by Petitioner in its Brief are:

Unadilla Valley Ry. Co. v. Dibble (C. C. A., N. Y. 1929), 31 F. (2d) 239, Cert. denied 280 U. S. 565, 50 S. Ct. 25, 74 L. Ed. 618.

Bradley v. Northwestern Pac. R. Co. (C. C. A. Cal. 1930), 44 F. (2d) 683.

St. Louis Southwestern Railway Co. v. Simpson (1932), 286 U. S. 346, 52 S. Ct. 520, 76 L. Ed. 1152.

McDonald v. Great Northern Ry. Co. (1926), 166 Minn. 87, 207 N. W. 194, 198.

See also *Southern Ry. Co. v. Hylton* (C. C. A. Tenn. 1930), 37 F. (2d) 843, Cert. denied 281 U. S. 745, 50 S. Ct. 351, 74 L. Ed. 1158.

Pere Marquette Ry. Co. v. Haskins (C. C. A. Mich. 1933), 62 F. (2d) 806.

These cases all involve direct violations by the injured employee of express orders in respect to immediate and particular dangers. In the case at bar, on the other hand, the only violation claimed is that of a general safety rule. As will be pointed out later in this Brief, the courts have made a clear distinction between the two types of violations.

In the *Frese v. Chicago, Burlington & Quincy R. R. Co.* case, a statute of the state in which the accident occurred made it the positive and exclusive duty of the engineer to stop his train at a certain distance from a crossing with other railroad tracks, and to ascertain that the way was clear before proceeding. He violated this statute and was killed in the resulting collision. Here again there was a direct violation of a specific statute relating to a particular danger as distinguished from a general safety rule.

In the *Great Northern Ry. Co. v. Wiles* case, a train was stopped when a draw bar was pulled out. It was the duty of plaintiff's intestate, the rear brakeman, to protect the rear of the train. The engineer signalled him to go back and

do so. He did not go back, and was killed in the resulting rear end collision. In denying plaintiff recovery, the Court stated that the pulling out of the draw bar created a condition which demanded instant performance of duty by deceased, thus indicating that the defective draw bar merely created a dangerous condition and that the negligence of deceased was the proximate cause of the accident. That this was the basis for the Court's decision is definitely stated in the subsequent case of *Union Pacific R. R. Co. v. Hadley* (1918), 246 U. S. 330, 38 S. Ct. 318, 62 L. Ed. 751, where the Court, in allowing recovery in a case of almost the same fact situation with the added factor that there was evidence of negligence on the part of other employees of the company, said:

> "In *Great Northern Ry. Co. v. Wiles*, 240 U. S. 444, it appeared that the only negligence connected with the death was that of the brakeman who was killed."

In the case of *McCalmont v. Pennsylvania Co.*, plaintiff's intestate, an inspector, went between two cars standing on a storage track for removal to the repair shop, to shorten a chain coupling. He failed to put out a blue flag as expressly required by the rules of the company. Another car was kicked onto the track and by reason of the absence of the coupler, he was killed. Plaintiff was denied recovery under the Safety Appliance Act upon the double ground that the company was not "using, holding, permitting to be used or held on its line" the defective car at the time, and that the failure of deceased to put out the warning flag, rather than the defective condition of the car, was the proximate cause of the accident.

It is to be noted that in both the *Great Northern Ry. Co. v. Wiles* and *McCalmont v. Pennsylvania Co.* cases, the de-

ceased employee was aware of the earlier negligence or violation of the Safety Appliance Act on the part of the employer, and that subsequent thereto he failed to comply with a rule of the employer providing for a specific contingency. That this distinction is sound and has been recognized by the Federal Courts is brought out in the case of *Paster v. Pennsylvania R. R.* (C. C. A. N. Y. 1930), 43 F. (2d) 908, in which the Court said:

> "* * * such cases as Great Northern Ry. Co. v. Wiles, 240 U. S. 444, 36 S. Ct. 406, 60 L. Ed. 732, and McCalmont v. Pennsylvania R. Co., 283 F. 736 (C. C. A. 6), though often cited as exceptions, do not strictly involve contributory negligence at all, because in those the servant was aware of the earlier fault, and his subsequent disregard of the rule brought the case among those where the last wrongdoer is wholly liable, if he has had opportunity to shape his conduct upon existing facts, however caused."

The same distinction can be made in the *Boghich v. Louisville & N. R. Co.* case.

The case at bar is clearly distinguishable from these three cases. In the case at bar, up to the time of his death or at least until a second or two before his death, decedent had no intimation whatsoever of the defectiveness of the headlight on the engine of the train which overtook and killed him. His violation of one of the general safety rules of Petitioner in failing to secure a line up of trains shortly prior to the fatal accident, at most constituted a concurring act of contributory negligence.

It will be seen from the above brief analysis of the cases cited by Petitioner in support of its contention that the negligence of decedent was the sole proximate cause of his death, that all of the cases are plainly distinguishable from

the case at bar. Those in which no negligence on the part of the railroad company was shown are clearly not in point. The decision in the *Great Northern Ry. Co. v. Wiles* case was based upon the ground that the negligence of the railroad company merely created a dangerous condition which had no connection with the accident and that in effect there was no negligence on the part of the railroad company. The *Wiles* case therefore also is not in point. The decision in the *McCalmont* case was based upon the double ground that the defective car was not in use at the time of the accident, and that even assuming that the car was in use it merely created a dangerous condition and that decedent's failure to put out a warning flag was the proximate cause of the accident. In both the *Great Northern Ry. Co. v. Wiles* and *McCalmont v. Pennsylvania Co.* cases, the negligence of the decedent was a highly efficient intervening act, as distinguished from a concurring act of negligence. The other cases all involved a direct violation by the injured employee of an *express order or statute in respect to an immediate and particular danger*, as distinguished from a violation of a *general safety* rule.

That the courts have recognized a distinction between the two types of violations, and have definitely limited the application of the sole proximate cause rule to the situation involving the former type of violation, is well brought out in the case of *Miller v. Central R. Co. of New Jersey* (C. C. A. N. Y. 1932), 58 F. (2d) 635, Cert. denied 287 U. S. 617, 53 S. Ct. 18, 77 L. Ed. 536. The facts of this case disclose that plaintiff's intestate, the engineer of an inferior train, was killed when his train collided with an opposing superior train. The fireman was operating the inferior train at the time of the accident, and failed to see the oncoming train.

If the engineer had been looking out of the left side of the cab he would have seen the other train. A rule of the company required inferior trains to keep out of the way of opposing superior trains. The conductor violated this rule by ordering decedent to proceed without finding out whether there was any opposing train. Another rule of the company provided that both the conductor and engineer are responsible for the safety of the trains and the observance of its rules. In affirming judgment for plaintiff, the Court said:

> "We assume for argument that he was negligent in this last respect, and that except for the statute the plaintiff could not recover. But it seems to us that the situation involved two concurring acts of contributory negligence, and was not one where the employee has disobeyed a rule and is 'primarily' responsible. * * * All these decisions involved specific precautions for specific occasions; the stopping of a train at a given spot until another passed, or until the track was clear. *No doubt the doctrine is not confined to train movements (Paster v. Pennsylvania* R. R., 43 F. (2d) 908 (C. C. A. 2); *but it does not seem to us to extend to rules generally enjoining caution, or responsibility, in spite of some of our language looking to the contrary in Reynolds v. New York O. and W. R. Co.* (C. C. A.), 42 F. (2d) 164. *If it did, an employer could revive the defense of contributory negligence by imposing as an affirmative duty such care as is appropriate to the situation, which is just what the common law makes a condition upon recovery. The statute was designed to end that defense and cannot be so conveniently avoided; the doctrine does not in our judgment apply, except when more definite commands are given to meet more definite situations; how definite we need not decide."* (Italics ours.)

Respondent calls particular attention of this Court to the argument of the Court in the *Miller* case that if the violation of any and every rule of the railroad company would prevent recovery, or if the railroad company were permitted to make rules imposing upon employees certain "primary" duties, then in practical effect the defense of contributory negligence, which was abolished by the statute, would be revived, and the statute would be avoided. It will be recalled that in the case at bar hundreds of rules, letters, instructions and circulars were sent out to decedent (R. 120-122).

The limited application of the sole proximate cause rule is also well brought out in the recent United States Supreme Court case of *Rocco v. Lehigh Valley R. Co.* (1933), 288 U. S. 275, 53 S. Ct. 343, 77 L. Ed. 743, the facts of which are strikingly similar to those of the case at bar. In the *Rocco* case, plaintiff's intestate, a track inspector, while riding a track inspection tricycle, was killed in a head-on collision with a passenger train on a single track on a blind curve about one mile north of Ithaca. Decedent's schedule required him to leave Ithaca at 3:30 P. M. The colliding train, due at Ithaca at 12:23 P. M., was over three hours late, due to washouts. It had left the next village—eight miles north of Ithaca—at 3:14 P. M. Decedent could have ascertained this fact by asking the operator about lineups. He knew of the company rule requiring him to ask for lineups because he had been reprimanded once or twice before for not having done so. There was a verdict for plaintiff, which was reversed by the Circuit Court of Appeals on the theory that decedent's negligence was the primary or sole proximate cause of the accident. In reversing the Circuit Court of Appeals, the United States Supreme Court said of the sole proximate cause cases:

> "These were cases where a member of a train crew was killed as a result of disregarding orders to wait at a given point until a train moving in the opposite direction had passed. In each of them the decedent's negligence was the proximate and efficient cause of the accident; in each it was sought to show that the fatality was in part due to alleged negligence of some other employee in omitting to give the decedent an order which would have reminded him of the orders previously given and by which he was bound."

The Court went on to say that if the company rule had forbidden decedent to leave Ithaca under circumstances such as inquiry by him would have disclosed, there might be some basis for applying the sole proximate cause rule, but that his infraction of the rule in question could not in any proper sense be considered the primary cause of the accident.

Respondent submits that the case at bar is so parallel on its facts to the *Rocco* case that the latter is controlling over it. In both cases, decedent was rightfully on the track, riding a speeder or tricycle in the performance of his duties. In both cases, decedent neglected to secure a lineup of trains before leaving the station. In both cases, decedent was struck by a delayed train. In the *Rocco* case, the train hit decedent head-on in the daytime on a blind curve. In the case at bar, decedent was struck from behind in the night time on a straight track. In the *Rocco* case, the Court held that it was the duty of the motorman to keep a lookout and give warning in places where the view of one who might be expected to be on the track was shut off and the view obstructed. If the operator of a tricycle on a blind curve on the track is entitled to warning of the approach of a delayed train in the daytime, surely by the same criterion the operator of a speeder on a straight track is at least entitled to

have the headlights of a delayed train approaching from behind in the night time in proper working order so that he may be given a warning which will approximate as nearly as possible that accorded the former operator.

Upon the above considerations and in view of the above authorities Respondent submits that the sole proximate cause rule exemplified by the *Unadilla Railway Co. v. Caldine* and *Davis v. Kennedy* cases is inapplicable to the case at bar. As the Court in the *Miller v. Central R. Co. of New Jersey* case stated, the rule cannot be extended to include violations of *general caution* or *safety rules,* but must be limited to violations of *specific orders or commands given to meet definite and particular situations.* If it were otherwise, the old common law defense of contributory negligence, which the statute relating to safety appliances was designed to eliminate, would again be revived.

D.

Decedent was entitled to the warning which a proper headlight would have afforded him, and the so-called "No Duty to Warn" rule urged by Petitioner is not applicable to the case at bar.

Petitioner contends that it owed decedent no duty to look out for or warn him of the approach of its train (Petitioner's Brief, pp. 16 and 17). In support of this contention, Petitioner cites the following cases:

Connelley v. Pennsylvania R. Co. (C. C. A. 1915), 228 Fed. 322.

Aerkfetz v. Humphreys (1892), 145 U. S. 418, 12 S. Ct. 835, 36 L. Ed. 758.

Chesapeake & Ohio Ry. v. Nixon (1926), 271 U. S. 218, 46 S. Ct. 495, 70 L. Ed. 914.

Bernola v. Pennsylvania R. Co. (C. C. A. 1933), 68 F. (2d) 172.

Atlantic Coast Line R. Co. v. Driggers (1929), 279 U. S. 787, 49 S. Ct. 490, 73 L. Ed. 457.

May v. Chicago, M. & St. P. Ry. Co. (1920), 147 Minn. 310, 180 N. W. 218.

Greisch v. Minneapolis, St. P. & S. S. M. Ry. Co. (1924), 160 Minn. 83, 199 N. W. 517.

Dozier v. Missouri Pac. R. Co. (1928), 176 Ark. 651, 3 S. W. (2d) 678.

Norfolk & W. Ry. Co. v. Smith (1929), 152 Va. 165, 146 S. E. 268.

Cincinnati, N. O. & T. P. Ry. Co. v. Swann's Adm'x (1914), 160 Ky. 458, 169 S. W. 886.

Rowe v. Chesapeake & Ohio Ry. Co. (1926), 215 Ky. 525, 286 S. W. 784.

In the *Connelley v. Pennsylvania R. Co.* and *Aerkfetz v. Humphreys* cases, the injured employees were track walkers or track repair men who were working on terminal tracks or in railway yards. Obviously, these cases present an entirely different situation than that involved in the case at bar. As the Court in the *Aerkfetz* case said:

> "The ringing of bells and the sounding of whistles on trains going and coming, and switch engines moving forwards and backwards, would have simply tended to confusion."

See *Southern Ry. Co. v. Colonna* (C. C. A. Va. 1933), 64 F. (2d) 237, Cert. denied 289 U. S. 762, 53 S. Ct. 795, 77 L. Ed. 1505, where the Court, in discussing the *Aerkfetz* and like cases, said:

"These cases disclose the limited obligation of a railroad to safeguard its employees in a railroad yard, where it is not practicable to give notice of the approach of engines and cars constantly moving back and forth and where experienced employees, thoroughly aware of the attendant dangers, are expected to take reasonable precautions for their own safety."

See also *Colasurdo v. Central R. R. of New Jersey*, (C. C. S. D. New York 1910), 180 Fed. 832.
Lehigh Valley R. Co. v. Doktor (C. C. A. N. J. 1923), 290 Fed. 760.

In the *Chesapeake & Ohio Ry. v. Nixon* case, the action was brought under the Federal Employers' Liability Act. Recovery was denied, not on the ground that the railroad company owed plaintiff's intestate no duty to look out for or warn him of the train's approach, but on the ground that plaintiff's intestate assumed the risk. Since assumption of risk is not a defense under the Federal Boiler Inspection Act, U. S. C. A., Title 45, Chapter 1, Section 7, this case can have no application to the case at bar.

In the *Bernola v. Pennsylvania R. Co.* case, decedent, a member of a section gang of four men, was struck from behind by a train while he was working on the track. The Circuit Court of Appeals, in affirming judgment for defendant, refused to follow the principle of law laid down in the *Rocco* case (See supra, pp. 31, 32) on the theory that that principle of law must be confined to "blind curve" cases, and that inasmuch as the accident in the *Bernola* case happened on a long, open, unobscured curve on which a workman could see an approaching train nine hundred feet away, the case was controlled by the line of cases exemplified by

the *Connelley v. Pennsylvania R. Co.* and *Aerkfetz v. Humphreys* cases.

Although not cited by Petitioner in its Brief, Respondent calls attention to another recent case, the facts of which are somewhat similar to those of the *Bernola* case. The case is that of *Thomson v. Downey* (C. C. A. Ill. 1935), 78 F. (2d) 487, Cert. denied 56 S. Ct. 154, 80 L. Ed. 125. The facts of the case disclose that decedent, a section foreman, was riding a velocipede around a three degree curve in a northerly direction on the right hand track. The temperature was twenty-five degrees below zero. Decedent had on an overcoat and also a cap with ear flaps. The colliding train, also going north, was more than three hours behind schedule. The engineer could not see more than three hundred feet ahead because he was riding the outside curve. The fireman was not looking out his window. It was daytime, and decedent could have seen the approaching train for a distance of four thousand feet by looking across the curve, which was unobstructed by trees or buildings. The engineer was whistling for a crossing at the time. Action was brought under the Federal Employers' Liability Act. There was a verdict for plaintiff. In reversing and remanding the case, the Circuit Court of Appeals held that the facts did not present an unusual or extraordinary condition such as was present in the *Rocco* case, that decedent being a section foreman, was under duty to look out for approaching trains, and that he assumed the risk appertaining thereto.

It is Respondent's contention that the Circuit Court of Appeals in the *Bernola* and *Thomson* cases erred both in so strictly limiting the doctrine of the *Rocco* case, and in extending the rule of the *Connelley* and *Aerkfetz* cases to apply to accidents occurring outside of terminals and railroad

yards. The decisions, like the *Chesapeake & Ohio Ry. v. Nixon* case, should have been placed on the ground that decedent assumed the risks of his employment rather than on the ground that the railroad company owed him no duty to watch out for and give him warning. However, even assuming that the *Bernola* and *Thomson* cases were correctly decided, it does not follow that the case at bar falls within the rule of those cases rather than within that of the *Rocco* case. The Court in the *Bernola* case distinguished the fact situation there present from that in the *Rocco* case in this, that in the *Bernola* case the accident happened on "a long, open, unobscured curve on which a workman could see an approaching train nine hundred feet away." But the accident in the case at bar happened at night. Decedent could not see the train approaching because of the darkness, and because he was facing in the same direction as the train was going. He could not hear it because of the noise of his own speeder. His predicament is comparable to that of decedent in the *Rocco* case. In that case, decedent, proceeding toward the train in the daytime, had no warning because he was on a blind curve. In the case at bar, decedent, proceeding ahead of the train, had no warning because it was dark. In the *Rocco* case, the railroad company was negligent because it failed to keep a proper lookout for decedent so that he could have been warned by whistle in time to jump. In the case at bar, Petitioner failed to have the headlight on its engine burning bright enough so that decedent could have been warned by the illumination therefrom in time to jump.

That decedent was entitled to the warning which a properly burning headlight would have given him is well brought out in the cases of *Salabrin v. Ann Arbor R. Co.* (1916), 194 Mich. 458, 160 N. W. 552, and *Louisville & N. R. Co. v. Mullin's Adm'x* (1918) 181 Ky. 148, 203 S. W. 1058.

In the *Salabrin* case, plaintiff, with others on a handcar, was overtaken by a train and injured. The accident occurred about 6:30 P. M. There were no lights on either the handcar or the train—the train had been in an accident and the headlight had been broken. There was a verdict for plaintiff. Upon appeal, defendant contended that it owed plaintiff no duty in respect of the headlight. In affirming, the Court said:

> "We do not think that the use of a headlight, whether prescribed by statute or demanded by practice in good railroading, should be held to be for the benefit of the public only, and not for the benefit of the employees of the railroads. Such employees are obliged constantly to be upon the right of way and in the yards of the railroad companies, and after dark the use of a headlight is to them one of the highest guaranties of safety to life and limb."

In the *Louisville & N. W. Co.* case, plaintiff's intestate, a signal maintenance man, had 20 miles of track between Berea and Sinks to patrol. He lived at Snyder, which was five miles from Berea and 15 miles from Sinks. There was a tunnel one mile north of Sinks and 14 miles from Snyder. He left his home at Snyder heading for Sinks at 9:00 o'clock A. M. on a tricycle. A few minutes before he was killed he was seen in a telephone booth immediately south of the tunnel. When he reached the mouth of the tunnel on his tricycle, he was struck by a fast passenger train going north. His body was found in the tunnel about 60 feet from its mouth. The accident happened at 4:28 P. M. on December 17. It was dark and rainy. The trial court instructed the jury that it was the duty of the railroad company to keep and maintain a headlight, properly lighted, upon the front of its engine when running in the dark, and if they believed

from the evidence that the deceased at the time he was struck and killed, was upon defendant's tracks, in the usual course of his employment, and that it was dark, and the defendant's agents and employees in charge of the engine negligently failed to have the headlight burning in the usual and customary manner, and that by reason thereof plaintiff's intestate was killed, they should find for plaintiff. There was a verdict for plaintiff. In affirming, the appellate Court said:

"Though the train operators testified to the contrary, there was evidence to the effect that the headlight on the engine was not burning at the time of the accident. * * * It may be conceded that a railroad company does not owe to an employee such as deceased the duty to run its trains at a reasonable speed, or to give warning of their approach, or to keep a lookout. It may further be conceded that a railroad company does not owe to a trespasser the duty of maintaining a headlight on its engine. Here, however, the deceased was neither a trespasser nor a bare licensee, but an employee who was rightfully on the track. While it is true that it was his duty to exercise ordinary care to learn of the approach of trains and to keep out of the way, yet, the nature of his employment and the conditions under which he worked were such that he necessarily had to be on the track when trains were approaching. In the daytime it would be an easy matter to see the train, but if it was dark, and no headlight was maintained, he would be deprived of the best, and in many instances the only, means of seeing the train. In view of the fact that the law casts on such an employe the duty to discover the train and keep out of its way, it seems to us that there is a corresponding duty on the part of the railroad company to furnish the means by which an approaching train may be discovered. * * * We therefore conclude that the trial court did not err in holding that the company owed to the deceased the duty of main-

taining a headlight on its engine, and, in authorizing a recovery if its failure to do so was one of the contributing causes of his death.

* * * * * *

Of course the doctrine of assumed risk does not apply if the defendant was guilty of negligence in not maintaining a headlight, for the servant never assumes the risk of the master's negligence unless he knows of the negligent act and appreciates the danger or the negligent act and consequent danger are so obvious that a person of ordinary prudence in his situation would have observed the one and appreciated the other. Here there was not slightest opportunity to observe the absence of a headlight and appreciate the danger. On the contrary, the danger itself was created and concealed by the negligent act of the defendant."

See also

Fairport R. Co. v. Meredith (1934), 292 U. S. 589, 54 S. Ct. 826, 78 L. Ed. 1446.

Swinson v. Chicago, St. P., M. & O. R. Co., (1935), 294 U. S. 529, 79 L. Ed. 1041.

The Minnesota cases and all but one of those from other state courts cited by Petitioner in support of its contention that the case at bar falls within the rule that a railroad company owes an employee on the tracks no duty to look out for or warn him of the approach of a train, are all distinguishable from the case at bar.

In the Minnesota case of *May v. Chicago, M. & St. P. Ry. Co.*, plaintiff's intestate was run over by a train at 11:30 P. M. The evidence was clear that the engineer was on the lookout, and whistled and applied his brakes as soon as the outline of the speeder showed up in the light. The engineer

testified that he did not see anyone on the speeder. No claim was made of a defective headlight, and there was nothing in the evidence to show that the railroad company was negligent in any other respect.

In the Minnesota case of *Greisch v. Minneapolis, St. P. & S. S. M. Ry. Co.,* plaintiff's intestate, a section hand, was struck and killed by a passenger train while unloading rail braces from a handcar. The engineer of the train testified that he had his automatic bell ringing; that he saw decedent and his fellow workers when about 1700 feet away and gave the crossing signal, which was the usual signal to warn sectionmen; that when he was about 300 or 400 feet from the men he saw they were not moving off the track and began to give the danger signal; that one of the men looked up and got off the track but that decedent did not move.

The Arkansas case of *Dozier v. Missouri Pac. R. Co.* and the Virginia case of *Norfolk & W. Ry. Co. v. Smith* both involved actions brought under the Federal Employers' Liability Act. In both cases, plaintiff was denied recovery on the ground that he assumed the risk.

In the Kentucky case of *Cincinnati N. O. & T. P. Ry. Co. v. Swann's Adm'x,* deceased, acting foreman of a crew of men putting in some water columns, was killed by a passing train as he was looking down into a pit. He could have used two or three places which would have been safe. In reversing judgment for plaintiff, the appellate Court said:

> "To the employe like Swann, whose duty it is to look out for trains and protect the track, the company does not owe any of the duties assigned as negligence in this case. It only owes him the duty of exercising ordinary care to protect him from danger after his peril is dis-

> covered, and there is no claim in this case that the collision with Swann could have been prevented after his danger was discovered. What duties railroad companies owe to other classes of employes, engaged on or about the track, we need not determine, as such an inquiry would not be pertinent to the case in hand."

In the Kentucky case of *Rowe v. Chesapeake & Ohio Ry. Co.*, plaintiff's intestate, a section foreman, was on his way home with his crew on a handcar. On a curve the handcar collided with a motor car, carrying a load of railroad officials, coming in the opposite direction, and the section foreman was killed. In running around the curve the section foreman had failed to comply with Rule 10, which provided that unless the track is seen or known to be clear, movement must be made under full flag protection. In denying relief under the Federal Employers' Liability Act, the Court said:

> "The primary negligence causing the collision was that of the section foreman in running his handcar around Ben Bow curve without complying with rules 10 and 13.' As his negligence was the primary cause of the trouble, there can be no recovery by him or by his wife or children under the federal liability statute. *Frese v. Chicago, Etc., R. Co.*, 44 S. Ct. 1, 263 U. S. 1, 68 L. Ed. 131."

It is to be noted that the Court in the *Rowe* case based its decision on the holding of the *Frese v. Chicago, Burlington & Quincy R. R. Co.* case. It will be remembered that that case involved a direct violation of a specific statute relating to a particular danger as distinguished from a general safety rule. It is Respondent's opinion that the Court in the *Rowe* case overlooked the well-defined distinction between the two types of violations, and that its decision was erroneous.

Respondent submits that the cases cited by Petitioner for the proposition that a railroad company owes an employee on the tracks no duty to look out for or warn him of the approach of a train, are not applicable to the case at bar. It is Respondent's opinion that the well-considered cases limit this rule to accidents occurring in terminals and railroad yards, where the ringing of bells and sounding of whistles would only tend to increase confusion. If there is any basis for the rule, it lies in the fact that in such situations the employee must be held to have assumed the risks of such employment. Even if it be conceded that the rule has been extended by such cases as *Chesapeake & Ohio Ry. v. Nixon*, *Bernola v. Pennsylvania R. Co.* and *Thomson v. Downey* to apply to accidents occurring on the main tracks, the basis of the rule still lies in the fact that the employee must be held to have assumed the risk. Since assumption of risk is no defense to an action brought under the Federal Boiler Inspection Act, the rule, even as extended, cannot be applicable to the case at bar.

E.

The case was properly tried and submitted to a jury and judgment of the Minnesota Supreme Court herein should be affirmed.

In summary, Respondent submits that there is ample evidence, when taken with the inferences which the jury might reasonably derive therefrom, for the jury to decide that there was a violation by Petitioner of the Federal Boiler Inspection Act in respect to headlights, and that there was a causal connection between that violation and the death of decedent. Respondent further submits that upon

the facts presented in the case, neither the sole proximate cause rule, nor the no duty to warn rule relied upon by Petitioner are applicable to the case at bar.

Respondent therefore respectfully asks that the judgment of the Supreme Court of the State of Minnesota be affirmed.

Respectfully submitted,

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Dated at South Saint Paul, Minnesota, this 21st day of March, 1936.

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IN THE

Supreme Court of the United States

October Term, 1935

No. 696

CHICAGO GREAT WESTERN RAILROAD COMPANY, a corporation,
Petitioner,

vs.

MARY RAMBO, as Administratrix of the Estate of ROY C. RAMBO, deceased,
Respondent.

PETITION FOR RE-HEARING.

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Respondent.

PETITION FOR RE-HEARING.

Respondent respectfully petitions the court for a re-hearing upon the following grounds:

I. The court is seriously mistaken upon the facts, as appears from the opinion which contains statements directly contrary to clear, undisputed testimony in the record.

II. The court failed to consider important undisputed evidence which in itself was sufficient to support the verdict of the jury.

III. The opinion of the court is directly contrary to the decisions of this court governing the review of questions of fact.

IV. The decision of the court, directly contrary to the facts and the law, results in tragic injustice to the dependents of decedent.

I.

THE COURT IS SERIOUSLY MISTAKEN UPON THE FACTS AS APPEARS FROM THE OPINION WHICH CONTAINS STATEMENTS DIRECTLY CONTRARY TO CLEAR, UNDISPUTED TESTIMONY IN THE RECORD.

The opinion of the court in holding that the verdict of the jury, as affirmed by the trial court and Supreme Court of Minnesota, is based upon conjecture, discusses two portions of the evidence. As to both portions the opinion indicates that the court is mistaken upon the facts.

In refusing to permit the jury to give any weight to the testimony of the engineer, the opinion of the court makes this surprising statement:

> "Simply because the engineer failed to see some object 800 feet ahead, does not show that he could not have seen so far; his attention might have been directed to points nearer to him or momentarily diverted. How far ahead he was looking does not appear."

This statement is directly contrary to clear undisputed testimony in the record. On page 235 of the record we find this statement of the engineer given to the claim agent of the appellant shortly after the accident.

> "I saw the object ahead just as quick as I could see it with the aid of the headlight and was looking ahead all the time."

Likewise on page 175 of the record, we find this testimony of the engineer while being examined by counsel for the appellant:

"Q. Were you doing anything which would give you accurate information as to how far that object was from you?

A. I was just looking straight ahead.

Q. Were you looking straight ahead at all times?

A. Yes."

and again on page 53 of the record:

"Q. Were you looking ahead immediately before you saw what appeared to be a couple of dogs?

A. Absolutely.

Q. Were you looking ahead at all times from the time you rounded the curve until you hit the speeder?

A. Yes.

Thus on three separate instances in this record the statement of the court is directly and unequivocally refuted.

Can it be said as a matter of law that the jury shall not be permitted to believe this testimony when there is not one word of testimony to the contrary in the entire record?

The incorrectness of the court's statement is further demonstrated by the repeated testimony of the engineer that when he first observed the object upon the track it appeared to be a couple of dogs, when in fact it was a four wheel speeder with a seat and platform hip-high, and a man seated erect upon it.

The other portion of the evidence discussed by the court is the testimony of the fifteen year old farm boy. The opinion does not fairly state his testimony and contains this statement which appears to be a mistake:

"Saw train 'about a hundred feet or so' before it struck speeder, headlight beaming, man sitting down on speeder."

On page 78 of the record, we find this cross-examination of the boy by counsel for the appellant apparently endeavoring to distort the boy's previous testimony:

"Q. And you first saw the train when it was 100 feet from the speeder?

A. No, at the (that) time I first saw the speeder I saw the train when it was on the underground crossing."

The boy had previously testified clearly and definitely that he had heard the speeder but had not seen it until the train was within 100 feet of it. His testimony on Page 76 on cross-examination was as follows:

"Q. How far was the motorcar from the train when you first saw the motorcar?

A. About three-fourths length of a telephone pole.

Q. I beg your pardon?

A. About three-fourths of a length of a telephone pole in between telephone poles.

Q. How far would that be?

A. I do not know.

Q. I think you testified as to various distances here accurately. Now, can you not tell me about how far this speeder was from the engine when you first saw the speeder? I am not trying to pin you down to exact feet, but what is your best judgment as to distance?

A. About a hundred feet or so.

* * * * *

Q. That headlight completely flooded the man and speeder with light?

A. It was not very plain."

and on page 75, the boy testified:

"Q. Where was the train when you first noticed the lights of the train?

A. About by the underground crossing."

Exhibit "E" shows that this crossing is at least more than 500 feet before the place of the collision.

This witness further marked upon plaintiff's Exhibit "C", the relative position of the train and the speeder when he first saw the speeder ahead of the train, with a number 1. A number 2 mark was made showing where the speeder was at that time, a distance which as observed on the photograph, considering the distance between the posts to be 175 feet, is a distance of approximately 100 feet. Then the point at which the collision occurred is indicated by the point at which the boy is standing in the picture, which is a matter of perhaps forty feet farther down the rail where the train overtook the speeder (R. 70). As the pictures disclose, this accident unfolded before this young man upon the raised elevation of the track. He testified clearly as to his observations and could not be tripped up upon cross-examination. In fact he had given the claim agent for the railroad a signed statement the day following the accident in which he stated:

"It was too dark to see the motor car when I first heard it, but when the train got closer I could see the motor car in the glare of the headlight."

It is significant to note that the boy heard the whistle and saw the sparks begin to fly from the wheels while the train traveled this last 100 feet, which, taken in connection with the testimony of the engineer, indicates that the boy saw the speeder ahead of the train about at the same time that the engineer was able to see it, and as the boy testified, even then

"it was not very plain." Certainly a headlight on a locomotive which would meet the statutory test of enabling the engineer to see an object as large as a man 800 feet away, should cause an object as large as we are here concerned with to stand out in bold relief at the very short distance of 100 feet. In fact the headlights of an automobile with their range of visibility placed by most states at 200 or 300 feet will completely and plainly flood with light an object even more than 100 feet away. The headlights on a locomotive are required to be approximately three or four times as powerful.

It is submitted that the direct testimony of the boy of what he observed was proper evidence for the jury to consider and the jury should not be required as a matter of law to disregard his testimony. This is particularly true when we note that there is not a scintilla of evidence to the contrary.

II.

THE COURT FAILED TO CONSIDER IMPORTANT UNDISPUTED EVIDENCE WHICH IN ITSELF WAS SUFFICIENT TO SUPPORT THE VERDICT OF THE JURY.

We submit that upon the record, the jury was entitled to conclude that the engineer was looking ahead to the outer range of his vision with the aid of the headlight, and did see the object as quickly as he was able to see it.

The record further is clear and uncontroverted that immediately upon seeing the man upon the speeder, the engineer applied his brakes in emergency, sanded his wheels, and stopped the train (R. 52). This testimony is repeated (R. 56, 57 & 58).

This immediately points out with inescapable logic that the point at which the brakes were applied, and the point at which the engineer discerned the man upon the speeder, are the same. It is our contention that under the evidence in this record, the jury could very properly and in fact almost inescapably conclude that the brakes were not applied until the locomotive was less than 100 feet from the speeder, and that hence the light was so deficient that the engineer could not distinguish the man and the speeder until within 100 feet of them.

Let us consider this evidence step by step.

The engineer testified that the train was traveling at a speed of sixty miles an hour and that he kept the brakes on emergency until he came to a stop (R. 58, 55). This was the maximum speed permitted on this track (R. 192). This is undisputed. It is also undisputed that the train traveled 2300 feet *beyond the point where it overtook the speeder.*

The appellant conducted some very exacting brake tests with the same equipment, at the same spot, with the same engineer applying the brakes in the same manner, the train going at the same speed (R. 59, 60, 184, 185, 183) and on these occasions the train traveled 2170 and 2210 respectively *from the point where the engineer was flagged*, that is, given the signal to apply the brakes.

Was not the jury entitled to consider these portions of evidence in their relation to each other? What conclusion does it lead to? Obviously the brakes of the locomotive on the night of the fatal collision were not applied until the moment of the crash. At least they were not applied more than 100 feet before the crash, as this would already be allowing a latitude of some 200 feet.

Could not the jury then properly conclude that the engineer did not distinguish the decedent upon his speeder until within 100 feet of him, and that the reason therefore was the deficiency of the headlight of the locomotive at that time.

In other words, the point at which the engineer received the impulse to apply the brakes for the test would correspond to the point at which the engineer received the impulse (that is distinguished the man on the speeder) on the night of the fatal collision.

The experts and the tests say that the impulse was received about 2200 feet from the point where the train stopped. The train went 2300 feet beyond the point of collision. Does this not mean, or at least is it not proper for the jury to conclude, that the engineer did not receive the impulse until practically the second he hit the speeder, and that the reason was that the headlight did not comply with the requirement?

The force of this logic is even more apparent when we realize that if the headlight did comply the brakes would have been set when the train and speeder were 800 feet apart, and with the speeder moving in the same direction at a speed of 20 miles per hour the train would travel more than 1400 feet with its brakes set before it overtook the speeder.

The conclusion which this scientific and mathematical evidence supports is also strongly corroborated in an independent manner by the testimony of the boy. He testified that the sparks began to fly from the wheels of the train about one rod from the speeder. This is a direct corroboration that the brakes were not applied until practically the moment the collision occurred. It again supports the verdict of the jury that the headlight was deficient at the time of the accident.

The testimony of the fireman also strongly supports the conclusion of the jury that the headlight did not comply.

Having in mind the undisputed testimony of the engineer that he applied the brakes immediately upon distinguishing the speeder and the man we find the fireman stating definitely that to him the crash with the speeder, the grinding of the wheels over the speeder, *the application of the brakes* and the toot of the whistle, all seemed to come together (R. 44). Under the evidence in the case the logical conclusion from this testimony is again that at the time of the accident the headlight was so deficient that the engineer was unable to distinguish the man on the speeder until practically the moment he hit it or within 100 feet of it, and consequently the brakes were not applied until that time.

Can it be said as a matter of law that a jury shall not be permitted to conclude from all of this evidence that the light was deficient? Can these logical conclusions be lightly put aside as based upon conjecture?

Is not every step, every piece of the logical whole a fair statement of undisputed evidence in the record? We respectfully submit that undisputed evidence in itself sufficient to support the verdict in this case was disregarded by the court.

III.

THE OPINION OF THE COURT IS DIRECTLY CONTRARY TO THE DECISIONS OF THIS COURT GOVERNING THE REVIEW OF QUESTIONS OF FACT.

The principle of review of issues of fact upon appeal was again and ably stated in the case of *Meyers vs. Pittsburgh Coal Company*, (1914) 233 U. S. 184, 34 Sup. Ct. 559, 68 L. Ed. 906.

> "Unless the testimony was such that no recovery can be had upon the facts shown, in any view which can be

properly taken from them, the verdict and judgment of the district court must be affirmed."

We submit that in direct contradiction of this rule the decision of the court interprets the evidence in accordance with its own view rather than from the light of what views may properly be taken of the evidence.

The case of C. M. St. Paul and Pacific Railway Company v. Coogan, 271 U. S. 472, 70 L. Ed. 1041, which the court refers to, does not alter this well recognized rule. In that case the court stated:

> "It is the duty of the trial judge to direct a verdict for one of the parties when the testimony and all the inferences which the jury reasonably may draw therefrom would be insufficient to support a different finding."

The facts of the *Coogan* case are clearly distinguishable. As the court pointed out in that decision:

> "As there is no direct evidence, it is necessary to determine whether the circumstances are sufficient to warrant a finding of that fact. Whenever circumstantial evidence is relied on to prove a fact, the circumstances must be proved and not themselves presumed."

In direct contrast to that situation, we have in the instant case not only direct testimony, but all the circumstances are proved by competent evidence, and the direct testimony, together with the circumstances, all strongly and substantially support the conclusion that the headlight did not comply at the time of the accident.

An example of the treatment of the evidence by the court in its opinion, which is directly contrary to the treatment to which the evidence is entitled upon appeal, is found in the discussion in which the court refused to permit the jury to

give the testimony of the engineer any weight. We find this statement of the court:

> "Evidently his (the engineer's) statements were merely guesses under the circumstances, accurate estimates of distances by him was impossible."

Is this not a statement such as one juror might make to another in an argument over the case? Can it be said as a matter of law that an engineer of long experience cannot tell the difference between six car lengths and sixteen car lengths while traveling sixty miles an hour?

In other words, can it be said as a matter of law that a motorist cannot tell the difference between a distance of more than two city blocks, or of less than one city block, while traveling sixty miles an hour?

This complete disregard of the testimony of the appellant's own engineer as a matter of law, is even more disheartening when it is observed that every other portion of evidence in the case indicates that in fact even the shortest distance testified to by the engineer was an exaggeration, and that the correct distance was 100 feet or less.

None of the so-called light tests were conducted on the statutory basis and none were conducted by impartial observers or with any particular care.

The indirect evidence secured from defendant's employees might well be more accurate and reliable than their direct testimony under such circumstances.

The case of Line v. Erie R. Co., (C. C. A. N. Y. 1931) 47 F. (2d) 657 Cert. denied 289 U. S. 729, 53 S. Ct. 526, 77 L. Ed. 1478 is strikingly in point. Here the court permitted the jury to draw conclusions from the circumstances notwithstanding the direct testimony of the engineer to the contrary.

We respectfully submit that the review by the court of the evidence in this case was not in accord with the principles of appellate review of issues of fact, and was contrary to the decisions of this court in similar cases.

IV.

THE DECISION OF THE COURT, DIRECTLY CONTRARY TO THE FACTS AND THE LAW, RESULTS IN TRAGIC INJUSTICE TO THE DEPENDENTS OF DECEDENT.

We realize full well that a painstaking consideration of a case of this type is difficult for the court when concerned with momentous decision of nationwide import. We do not criticise the piecing together of sections of appellant's brief and of the opinion of the court below in the opinion. We do wish to submit, however, that to respondent and her dependents, this case is of greater importance than any other this court has considered.

We submit that the opinion and decision of the court is directly contrary to the principles of appellate review and to the facts of the case and results in a tragic injustice.

Wherefore, respondent respectfully prays a re-hearing before this court.

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Respondent.

AFFIDAVIT OF COUNSEL UPON PETITION FOR RE-HEARING.

STATE OF MINNESOTA,
COUNTY OF DAKOTA. } ss.

Harold E. Stassen does hereby certify and affirm that he is an attorney at law duly admitted to practice before the Supreme Court of the United States, that he is one of the attorneys in the above entitled matter; that he is presenting to the court a petition for re-hearing; that said petition is made in good faith and not for the purpose of delay.

Further affiant saith not save that he makes this affidavit and certificate pursuant to Rule 33 of the Rules of this court.

HAROLD E. STASSEN.

Subscribed and sworn to before me
this 16th day of May, 1936.

VIOLET A. STASSEN,
Notary Public, Dakota County, Minn.
My commission expires Jan. 8, 1942.
(SEAL)

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SUPREME COURT OF THE UNITED STATES.

No. 696.—October Term, 1935.

Chicago Great Western Railroad Company, Petitioner,
vs.
Mary Rambo, as Administratrix of the Estate of Roy C. Rambo, Deceased.

On Writ of Certiorari to the Supreme Court of the State of Minnesota.

[April 27, 1936.]

Mr. Justice McReynolds delivered the opinion of the court.

Half an hour after sunset (5:10), December 8, 1933, respondent's intestate, a signal maintainer, while riding his gasoline speeder over the rails, was run down and killed three miles south of Hampton, Minnesota, by petitioner's passenger train from Minneapolis, moving down grade sixty miles per hour. Darkness had come; the weather was cloudy; the train late; an hour earlier it had collided with a truck and killed a man.

Relying upon the Federal Employers' Liability Act, 45 U. S. C. A., c. 2, §§ 51-59, and the Boiler Inspection Act as amended June 7, 1924, 45 U. S. C. A., c. 1, §§ 22-34, respondent sued for damages in Dakota County District Court. The jury found for her; judgment upon the verdict was affirmed by the Supreme Court.

Several acts of negligence were alleged, but the trial court submitted only one to the jury: Failure to equip the locomotive with a headlight of the illuminating power required by federal law.

Section 23 of the Boiler Inspection Act is in the margin.[1]
Under permission of that Act, the Interstate Commerce Commission adopted the following rule:—

129. Each locomotive used in road service between sunset and sunrise shall have a headlight which shall afford sufficient

[1]Sec. 23. It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 28, 29, 30, and 32 and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for.

illumination to enable a person in the cab of such locomotive who possesses the usual visual capacity required of locomotive engineers to see in a clear atmosphere, a dark object as large as a man of average size standing erect at a distance of at least 800 feet ahead and in front of such headlight; and such headlight must be maintained in good condition.

The Supreme Court declared:—"Since there was no motion for new trial, the assignments of error reach only the question whether there is any substantial evidence in support of the judgment. As stated, the sole act of negligence upon which the jury could base a recovery, under the charge of the court, was a violation of the quoted rule as to headlight; and, if defendant was negligent in that respect, is there sufficient evidence that the deficient headlight was the proximate cause of Rambo's death? The quantum of proof must measure up to the rule clearly and adequately stated in *Baltimore & Ohio R. R. Co.* v. *Groeger*, 266 U. S. 521." It held the evidence adequate.

In cases like this, we must examine the record and determine for ourselves whether as matter of law there is enough to sustain a finding of negligence. *C. M. & St. Paul R. Co.* v. *Coogan*, 271 U. S. 472, 474; *Atchison, T. & S. F. R. Co.* v. *Saxon*, 284 U. S. 458, 459.

The following excerpt from its opinion indicates the view of the Supreme Court.

"It is true that there is direct proof that the headlight was inspected at the time the locomotive was attached to the train in Minneapolis and when it arrived at its destination at Oelwein, Iowa, and that it then satisfied the requirement of rule 129; also that it was burning brightly when the train passed Hampton and shortly after the accident when the chief electrician of defendant, who happened to be on the train, having walked to the front thereof when the emergency stop was made, ascertained, and so testified at the trial, that the track ahead was illuminated properly for more than 800 feet. But this notwithstanding, we think there are facts testified to which authorized the jury in finding that the headlight did not comply with the standard fixed under the Boiler Inspection Act. Most persuasive of this is the testimony of the engineer himself, who testified that he was watching the straight track ahead but could see no object thereon until he was within 500 feet of what he took to be a couple of dogs, and not until he came 100 or more feet nearer could he make out that it was a man on a speeder. There is no suggestion that the engineer did not have the visual capacity

required of locomotive engineers. The fact that Rambo was seen to make no move to leave the speeder indicates that the headlight did not cast its rays sufficiently around where he was so as to give warning of the approach of the train. There is evidence to show that a person on a running speeder can quickly and without great danger swing himself clear of the rails. Then there is the testimony of a 15 year old lad, who lived adjacent to the track where Rambo was run down and who witnessed the accident, that while he heard a speeder coming he could not see it until the train which he heard and saw approaching came within about 100 feet of the speeder, when the headlight disclosed its presence to him, and that, when he heard the blasts of the whistle and saw the sparks from the application of the brakes, the locomotive was less than 50 feet from the speeder. It is thought the testimony of the engineer that the illumination of the headlight was so deficient that he could not ascertain what the object ahead of him on the track was until he was within 300 feet thereof, corroborated by the fact that the rays of light were not sufficient to arouse the attention of Rambo to the presence of the locomotive, and the testimony of the lad, who witnessed the accident standing a few rods from the track, that he, although knowing that both train and speeder were approaching, could not see the speeder until the headlight was within 100 feet thereof, justify the jury in finding that the headlight did not comply with the requirements of the Boiler Inspection Act." Federal

This apprizement of the evidence, we think, is not well founded. Properly interpreted, the record fails to establish that the headlight fell below the prescribed standard. The argument for respondent dwells too hard on conjecture. *Atchison, T. & S. F. R. Co.* v. *Saxon, supra,* 460.

The most important bit of evidence was given by the engineer, called as a witness for respondent. In substance it follows. "I saw something down on the track, at first when I noticed it, I thought it was a dog or two running down the track, when I got a little closer, I discovered it was a speeder, and I pulled the whistle. I gave a number of short blasts and the man on the speeder never turned or looked." "It [the object] might have been eight or nine [railroad] car lengths, eight, probably seven." A car length is around fifty feet. "I was watching ahead to see what it was, and I discovered it was a speeder." I discovered it was a speeder about five or six car lengths ahead. Immediately, "I put the brake in the emergency." I was looking ahead at all times after I rounded the curve until I hit the speeder traveling in the same direction. While I observed him, the man on the speeder "did not turn at all."

Treating the foregoing as a positive statement of observed facts, counsel argue that the headlight must have failed to illumine the track 800 feet ahead; otherwise, it is said the engineer would have seen the speeder at that distance and applied the brakes earlier. Also that, if warned by the light when 800 feet away, the decedent would have made visible effort to leave the speeder and thus escape. The presence of conjecture is plain enough. Simply because the engineer failed to see some object 800 feet ahead, does not show that he *could* not have seen so far; his attention might have been directed to points nearer to him or momentarily diverted. How far ahead he was looking does not appear. Nor can it be said that, since the deceased was not seen to change position on the speeder, he received no warning.

Further, the engineer's statements must be considered in connection with the circumstances attending the accident and other portions of his testimony. The train was moving 88 feet per second in the dark and under clouds. In a writing signed two days after the accident, he affirmed, "I first saw some object on the track in the glare of the headlight when the engine was 10 to 12 coach lengths away. It may have been a little less than 1,000 feet or could have been a little more. I saw no light on the object and when first seen it appeared to be two dogs running down the track. I pinched up on the brakes making a service application and when the engine was within 6 to 8 coach lengths I could make out for the first time that it was a motor car and a man on it going same way we were. I immediately continued the brake application into emergency, opened the sanders and started sounding a series of short blasts of whistle. I could make out a man on the car with his back to us, his coat collar turned up and looking ahead. I expected every second to see him make some effort to get off the car but so far as I could see he never changed his position until struck."

While on the stand (May, 1934), he said that the emergency brakes were applied "five or six car lengths" from the speeder. "It might have been more, it might have been less, it might have been a little more." Also that the "seven, eight or nine car lengths" was merely a guess. "It might have been eight, nine, or ten car lengths, it might have been a thousand feet or more, or it might have been a little bit less." Evidently, his statements were merely guesses; under the circumstances, accurate estimate of distances by him was impossible.

The 15 year old lad was in his father's yard 600 feet from the track, engaged in the exacting business of catching half grown chickens in the dark. In substance, he said:— "I heard a train coming." Next, "I noticed the train coming down the track." "Then I heard the speeder." By the light of the train, I saw the speeder in front. "When the train came closer, he whistled." When he got still closer, a rod away, I saw fire from the brakes. When I heard the speeder and heard the train, I looked away from the track towards some cornstalks to see if there was a chicken there. "When I looked back, then I saw it." Could not see man on speeder very plain and could not say whether he moved before being hit. Saw train "about a hundred feet or so" before it struck speeder, headlight beaming, man sitting down on speeder.

Nothing in all this gives substantial support to the notion that the headlight failed to illuminate the track 800 feet ahead, or was below the required standard. Other portions of the evidence stressed for respondent are no more helpful to her position.

The challenged judgment must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

Mr. Justice BRANDEIS took no part in the consideration or decision of this cause.

A true copy.

Test:

Clerk, Supreme Court, U. S.